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No. 08-554

In The
Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION ("MICHGO"),

Petitioner,

v.

DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of the Interior, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, authorizes the Secretary of the Interior – "in his discretion" – to acquire lands "for Indians." Two panel members below held that Section 5 establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust, aligning the D.C. Circuit with the First, Eighth, and Tenth Circuits. Judge Janice Rogers Brown dissented, agreeing with an earlier Eighth Circuit decision which held that Section 5 violates the nondelegation doctrine, agreeing with the Eleventh Circuit, which has held that Section 5 "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate," and agreeing with the 24 states that have asked this Court to hold Section 5 unconstitutional. The first question presented is:

1. Whether the standardless delegation by Congress of totally "discretion[ary]" authority to an Executive official to acquire land "for Indians" is an unconstitutional delegation of legislative power.

Section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479, defines the term "Indian" to include members of any recognized Indian tribe "now" under Federal jurisdiction. On February 25, 2008, this Court granted the petition for certiorari filed in *Carcieri v. Kempthorne*, No. 07-526, to determine whether the Secretary may exercise his unfettered power to acquire land "for Indians" on behalf of

QUESTIONS PRESENTED – Continued

Indian tribes that were not recognized "now," i.e., in 1934, when IRA was enacted. The second question presented here mirrors the question this Court will answer in *Carcieri*:

2. Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are Petitioner, Michigan Gambling Opposition; Respondents, Dirk Kempthorne, in his official capacity as Secretary of the United States Department of the Interior, and Lynn Scarlett, in her official capacity as Assistant Secretary of the United States Department of the Interior; and Intervenor/Respondent, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. Petitioner states that it has no parent corporation or subsidiaries.

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PETITION FOR CERTIORARI

Petitioner, Michigan Gambling Opposition ("MichGO"), respectfully petitions this Court to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The divided opinion of the court of appeals is reported at 525 F.3d 23 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the district court is reported at 477 F. Supp. 2d 1 and reproduced at App. 36a.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2008. App. 1a. On July 25, 2008, the D.C. Circuit denied, 7-3, a timely petition for rehearing *en banc*. App. 85a. The D.C. Circuit's jurisdiction was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides in pertinent part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479, provides in pertinent part:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

INTRODUCTION

This Court has long recognized the nondelegation doctrine as "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). Yet, after more than seven decades of disuse, the nondelegation doctrine's continuing vitality is in serious doubt. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring in the judgment). The Court's reaffirmance of the nondelegation doctrine as a guiding principle is sorely needed, particularly in the current economic climate, where panic has driven Congress to consider broad delegations of power to the Executive Branch without even thinking about separation of power principles, delegations that the nation has not seen since the depression-era statutes invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See, e.g.*, Marcia Coyle, *Bailout proposal grants sweeping powers to Paulson, but are they legal?*, NAT. L.J., Sept. 29, 2008 (questioning whether Secretary Paulson's preliminary bailout proposal could survive a nondelegation challenge, and postulating the present IRA litigation as a possible means "to reinvigorate the doctrine").

This case is the ideal vehicle for breathing fresh life into the nondelegation doctrine. MichGO presents a challenge to a statute, Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, enacted by the same Congress that enacted the defective laws

at issue in *Panama Refining* and *A.L.A. Schechter*. Section 5 baldly authorizes the Secretary of the Interior – "in his discretion" – to acquire property in trust "for Indians." The Secretary has acquired thousands of properties across the country under Section 5, removing vast areas from state and local jurisdiction. Yet, the statute identifies only a beneficiary, not an intelligible guiding principle that allows courts to discern whether the Secretary's actions are in accord with Congressional will.

The Eighth Circuit held Section 5 unconstitutional in *South Dakota v. United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded*, 519 U.S. 919 (1996) ("*South Dakota I*"). And the Eleventh Circuit in *Florida Department of Business Regulation v. United States Department of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985), concluded that Section 5 "does not delineate the circumstances under which exercise of this discretion is appropriate." But the D.C. Circuit has now joined the First, Eighth, and Tenth Circuits in rejecting nondelegation challenges to Section 5, in derogation of this Court's nondelegation precedent. As Judge Janice Rogers Brown explained in a lengthy dissent below:

> Like other courts that have rejected nondelegation challenges to § 5, *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (*en banc*); *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005) [*South Dakota II*]; *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), the majority

> nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. . . . Although I agree the nondelegation principle is extremely accommodating, the majority's willingness to *imagine* bounds on delegated authority goes so far as to render the principle nugatory. . . . [The panel majority's] approach *differs radically from the Supreme Court's analytical process in nondelegation challenges.*

App. 20a-21a (emphasis added, citations omitted).

In *South Dakota I*, Justices Scalia, Thomas, and O'Connor urged the Court to resolve Section 5's constitutionality. 519 U.S. 919, 920-23 (1996) (Scalia, J., dissenting). Over the last 12 years, that request has been joined by a chorus of 24 states.[1] The passage of time has been more than sufficient for the question of Section 5's constitutionality to "percolate." It is clear that simply incanting that 75 years have passed since the last successful nondelegation challenge – as most courts have done – is an insufficient basis for

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[1] *See Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006) (Utah; supporting *amici curiae* brief of Rhode Island, Alabama, Arkansas, Colorado, Idaho, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New York, North Dakota, Ohio, South Dakota, and Wyoming); *South Dakota II*, *cert. denied*, 127 S. Ct. 67 (2006) (South Dakota); *Carcieri*, No. 07-526 (2008) (Rhode Island; supporting *amici curiae* brief of Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah).

concluding that Section 5's unbridled delegation of legislative power is permissible. The fact that parties and numerous states have been forced to bring successive, adverse circuit decisions to this Court is a compelling reason to grant MichGO's petition, particularly where those decisions conflict with this Court's jurisprudence. The immense practical and legal impacts of the nondelegation question, both on our constitutional system and state sovereignty, counsel in favor of this Court's immediate review.

The importance of the second question presented cannot be reasonably disputed, as the Court has already agreed to review the same issue in *Carcieri*: if Section 5 permissibly delegates to the Executive branch carte blanche authority to acquire property in trust for Indians, then does the plain language of 25 U.S.C. § 479 restrict the beneficiaries of such trust actions to those tribes that were federally recognized in 1934, when IRA was enacted? MichGO respectfully requests that the Court grant the petition on this question as well. Since it is undisputed in this case that the Tribe was *not* federally recognized in 1934, MichGO asks that, in the event the Court adopts the Petitioner's position in *Carcieri*, the Court summarily reverse and remand the D.C. Circuit's decision in this case.

STATEMENT OF THE CASE

I. At the Time of IRA's Enactment in 1934, the Tribe Was Not Federally Recognized.

The Tribe descends primarily from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish during the late 1700s and early 1800s. From early in its history, the federal government recognized the Tribe, which had "unambiguous previous Federal acknowledgement" as a tribe through 1870. D.C. Cir. J.A. at 1767, 1774, 1777, 1785.

In a report on the Tribe's history, BIA determined conclusively that the Tribe's federal acknowledgement ceased in 1870, when the Tribe chose to discontinue its compliance with the Treaty of 1855 and received its last annuity-commutation payment. 62 Fed. Reg. 38,113 (1997). As the Tribe explained below, "the federal government withheld formal acknowledgement beginning in 1870. . . . Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands. . . ." Appeal Br. of Def.-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians at 3.

II. Sixty-five Years After IRA's Passage, the Tribe Is Re-acknowledged by the Federal Government.

In the mid-1990s, the Tribe applied for federal acknowledgment through the Department of Interior's formal recognition procedure. In a letter to the Assistant Secretary of Indian Affairs, the Tribe stated

that its tribal council had agreed to pursue federal acknowledgement provided "there would never be casinos in our Tribe." D.C. Cir. J.A. at 1863. Almost immediately after receiving federal acknowledgment, however, the Tribe submitted an application requesting that the government set aside land in trust for the benefit of the Tribe to construct and operate a casino. D.C. Cir. J.A. at 1733-58. On May 13, 2005, Respondents issued a notice of their intent to take the proposed casino site in trust for the Tribe. D.C. Cir. J.A. at 60-61.

III. The Lawsuit

MichGO is a Michigan non-profit corporation that seeks to protect the citizenry and quality of life in its community by opposing the proliferation of gambling venues. Its members reside in West Michigan and own the businesses and homes that will be most affected if the Tribe is successful in its attempt to bring 3.1 million casino visitors a year to a rural community of only 3,000 residents. D.C. Cir. J.A. at 21, 465, 1202, 1207-08.

DOI's asserted authority to take land in trust for the Tribe is Section 5 of the Indian Reorganization Act of 1934. 25 U.S.C. § 465. Section 5 is a broad, generic statute that tautologically authorizes the Secretary to acquire land "for the purpose of providing land for Indians." *Id.* Count IV of MichGO's Complaint alleges that Section 5 contains no intelligible standard to limit the Secretary's discretion to

take land in trust, and therefore violates the non-delegation doctrine.

IV. The District Court Is Unable to Find an Intelligible Principle that Would Render Section 5 Constitutional.

The District Court issued an opinion dismissing MichGO's nondelegation claim on February 23, 2007. The court did not identify an intelligible limiting principle in Section 5's bald statutory text, but rather relied on the purported limiting regulations the Department of the Interior had promulgated. App. 81a-83a. The District Court's holding was directly contrary to *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 473 (2001), in which this Court held that an agency cannot cure an unconstitutional, standardless delegation of power through the promulgation of limiting regulations. MichGO filed a timely appeal with the U.S. Court of Appeals for the D.C. Circuit on March 22, 2007.

V. While MichGO's Case Is On Appeal, This Court Grants Certiorari in *Carcieri v. Kempthorne*.

After briefing and oral argument, and while the parties were awaiting a decision from the D.C. Circuit, this Court granted certiorari on February 25, 2008, to review the First Circuit's *en banc* decision in *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007). In *Carcieri*, the First Circuit upheld the Secretary of

Interior's decision to take land in trust under IRA for the benefit of the Narragansett Tribe, even though the tribe had not been federally recognized in 1934, when IRA was enacted. *See id.* at 22. The First Circuit held that IRA's definition of eligible "Indian" tribes – namely, those "recognized [as] Indian tribe[s] *now* under Federal jurisdiction," 25 U.S.C. § 479 (emphasis added) – was ambiguous, and that the Secretary's interpretation was entitled to *Chevron* deference. *See id.* Applying that deference, the court held that the Secretary had reasonably interpreted IRA to require only that a tribe be federally recognized at the time of the relevant land-in-trust application. *See id.*

As the United States explained in opposing the certiorari petition in *Carcieri*, federal courts have consistently held that a tribe need not have been recognized in 1934 to qualify as "Indians" under IRA. Br. in Opp'n, *Carcieri v. Kempthorne*, No. 07-526, at 5 (Nov. 21, 2007) (stating that the First Circuit's decision "does not conflict with the decision of any other circuit"). The first hint of any contrary judicial opinion on this issue came when this Court granted certiorari in *Carcieri* and agreed to review the question of "[w]hether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." Immediately following that announcement, MichGO filed with the D.C. Circuit a Motion to Supplement the Issues Presented for Review to include the new

statutory interpretation issue presented in *Carcieri*, but the court denied the motion on March 19, 2008.

VI. A Divided D.C. Circuit Panel Holds Section 5 Constitutional.

The D.C. Circuit issued a 2-1 opinion on the merits of MichGO's appeal on April 29, 2008. In its ruling on the nondelegation issue, the majority chastised the District Court for relying on administrative regulations to provide the intelligible limiting principle. App. 12a. Nonetheless, the majority upheld the statute, *inferring* a limiting principle from IRA's purported "purpose" of promoting economic self-sufficiency, a purpose that the majority found implied in the Act's other provisions, general context, and legislative history. App. 13a-17a. In so holding, the majority aligned itself with decisions of the First, Eighth, and Tenth Circuits.

In a lengthy dissent, Judge Janice Rogers Brown concluded that Section 5 violates the nondelegation doctrine, agreeing with the Eighth Circuit's earlier decision in *South Dakota I*, and with the Eleventh Circuit's decision in *Florida* that Section 5 contains no intelligible principle to guide the Secretary's statutory discretion. Judge Brown criticized the majority's willingness to go beyond statutory text to find a limiting standard, noting that when a standard is entirely absent, as is the case here, this Court has refused to create one out of whole cloth. App. 24a (Brown, J., dissenting) (citing *Conn. Nat'l Bank v.*

Germain, 503 U.S. 249, 254 (1992)). As Judge Brown observed, "rather than an ambiguous standard that requires interpretation, § 5 provides an obvious, unambiguous direction that the Secretary is to have complete discretion," and the majority's asserted intelligible principle "arises from the majority's imagination, not from the [statutory] sources." App. 25a. "To rely on the purpose of 'providing land for Indians' does nothing to cabin the Secretary's discretion over providing land for Indians because it is tautological. To say the purpose is to provide land for Indians in a broad effort to promote economic development (with a special emphasis on preventing land loss) is tautology on steroids." App. 28a.

Judge Brown further noted that even if a "mood of economic self-sufficiency can be said to permeate § 5, [that mood] has never constituted a standard to guide the Secretary's decisions." App. 28a. The BIA and the courts have interpreted the statute to grant the Secretary unfettered discretion over which land to take in trust. App. 28a (listing cases). In holding that Section 5 is nonetheless constitutional, the panel majority, following the First, Eighth, and Tenth Circuits, took an approach that "differs radically from the Supreme Court's analytical process in nondelegation challenges." App. 30a (citing *Intermountain Rate Cases* [*United States v. Atchison, Topeka, & Santa Fe Ry.*], 234 U.S. 476, 486-86, 488 (1914), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Judge Brown concluded by emphasizing Section 5's exceptional importance. "[Section] 5 allows the Secretary,

by taking land in trust for Indians, to oust state jurisdiction in favor of government by the beneficiaries he chooses." App. 34a; *accord South Dakota I*, 69 F.3d at 882 ("By its literal terms, the statute permits the Secretary to [take] a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls."). In so doing, the Secretary exercises the power "to determine who writes the law, and thus indirectly what the law will be, for particular plots of land." App. 33a.

VII. A Divided D.C. Circuit Denies Rehearing *En Banc*.

MichGO filed a timely petition for rehearing *en banc*, and the D.C. Circuit ordered Respondents to file a response on the issue of whether Section 5 violates the nondelegation doctrine. Although the Court ultimately declined *en banc* review, Chief Judge David B. Sentelle and Judge Thomas B. Griffith joined Judge Janice Rogers Brown, indicating that they would have granted the petition. App. 85a.

VIII. The D.C. Circuit Panel Grants a Stay.

Following denial of the petition for rehearing *en banc*, Respondents rejected MichGO's request to refrain from taking the Tribe's land in trust pending this Court's decision on MichGO's petition for certiorari. Respondents opposed MichGO's subsequent stay motion, arguing that there was no reasonable

probability that four Justices of this Court would vote to grant certiorari. Apparently rejecting that argument, the same panel that ruled 2-1 *against* MichGO on the merits unanimously granted MichGO's stay motion. App. 87a.

IX. Chief Justice Roberts Denies the Tribe's Application to Vacate the Stay.

The Tribe filed an application to the Chief Justice seeking to vacate the D.C. Circuit's stay order. Again, the Tribe argued that there was no "reasonable probability" that four Justices would vote to grant certiorari. Chief Justice Roberts promptly denied the Tribe's motion, leaving the stay in place until the Court resolves MichGO's petition. App. 89a.

REASONS FOR GRANTING THE PETITION

I. AS RECOGNIZED BY THE EIGHTH CIRCUIT IN *SOUTH DAKOTA I*, JUDGE BROWN, AND NO LESS THAN 24 STATES, SECTION 5 OF THE IRA IS A RARE EXAMPLE OF A STANDARDLESS DELEGATION. THE STATUTE IS AN IDEAL VEHICLE FOR THIS COURT TO REAFFIRM THE NONDELEGATION DOCTRINE'S CONTINUING VITALITY.

The nondelegation doctrine is one of the cornerstones of separation of powers jurisprudence,

Mistretta v. United States, 488 U.S. 361, 371 (1989), existing since the days of Locke. *See* John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The legislat[ure] can have no power to transfer their authority of making laws, and place it in other hands."). The doctrine is codified in the Constitution's text, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States," U.S. Const. art. 1, § 1, and the "text permits no delegation of those powers." *Whitman*, 531 U.S. at 472. To avoid an unconstitutional delegation when conferring decision-making authority on an agency, Congress is required to articulate, "by legislative act," an intelligible principle to direct the person or body authorized to act. *Id.* at 473 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

It has been nearly 75 years since this Court last struck down a statute on nondelegation grounds, *see Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), leaving the doctrine's continuing viability in doubt. But the present case – which involves a statute enacted by the same depression-era Congress that enacted the unconstitutional legislation in *Panama Refining* and *A.L.A. Schechter* – provides the ideal vehicle to affirm the doctrine's continued vitality. As the Eighth Circuit observed in *South Dakota I*: "It is hard to imagine a program more at odds with separation of powers principles" than Section 5 of IRA. 69 F.3d at 885.

A. This Court Should Grant the Petition to Resolve a Conflict with Decisions of this Court.

Finding no intelligible guiding principle in Section 5's text, the majority below purported to infer such a principle from "the purpose and factual background of the IRA and section 5's statutory context." App. 13a. But the panel majority's approach – which mirrors that of the other circuits that have analyzed Section 5's constitutionality – "differs radically from [this] Court's analytical process in nondelegation challenges." App. 30a (Brown, J., dissenting). That is because "even in a nondelegation challenge, a court must find meaning for an ambiguous phrase *in some relevant text*." App. 31a (Brown, J., dissenting) (emphasis added) (discussing this Court's decisions in *Intermountain Rate Cases* and *American Power & Light Co.*). "Here, by contrast, the majority perceive[d] a mood of economic development, which Congress did not articulate, and the majority justifies this mood by its own assessment of Congress's good intentions." App. 31a (Brown, J., dissenting).

The Circuits' willingness to rely on statutory background and context to restrain Executive branch authority is particularly suspect where, as here, these sources do not even uniformly endorse the judicially defined purpose of "economic self-sufficiency." App. 25a-26a (Brown, J., dissenting) (noting, for example, that it is difficult to infer a principle of economic "self-support" in a statutory structure that "actually installs a paternalistic scheme of government

support"). To the contrary, as Judge Brown noted, Section 5's background and context lend themselves to any number of potential "intelligible principles":

> Making a different selection from the same smorgasbord, I might posit quite different principles – to provide land for landless Indians; to acquire trust lands to be used for farming; to supplement grazing and forestry lands; to provide lands in close proximity to existing reservations; to consolidate checkerboard reservations. All of these goals would be reasonable, but none can be derived from the text of the IRA. *The very fact that so many standards can be proposed merely highlights the fact that the statute itself fails to describe how the power conveyed is to be exercised.*

App. 28a (emphasis added).

Similarly misplaced is the panel majority's examination of IRA's legislative history, which, in the majority's view, "underscores [the statute's] purpose of addressing economic and social challenges facing American Indians by promoting economic development." App. 17a (citations omitted). Under this Court's precedent, legislative history can further illuminate an intelligible principle ensconced in the statutory text, but legislative history cannot supply one where the statute is silent. *See, e.g.*, *Mistretta*, 488 U.S. at 376 n.10 (using legislative history to add content to the statutory factors); *Whitman*, 531 U.S. at 472 (Congress must articulate an intelligible

principle "by legislative *act*") (emphasis added). Here, inferring *any* Congressional purpose "would be contrary to the plain text of § 5, which gives the Secretary unfettered discretion over such decisions." App. 31a (Brown, J., dissenting). Moreover, as is nearly always the case, the legislative history does not point in a single direction. *See, e.g., South Dakota I*, 69 F.3d at 883 (reviewing the legislative history and concluding that Congress enacted Section 5 for the purpose of providing homestead or agrarian lands for landless Indians).

It is the complete lack of any discernible intelligible principle in Section 5's *text* that distinguishes this statute from all others this Court has upheld over nondelegation challenges in the past 75 years. Section 5 does not contain even the very broad "public interest," "public health," "fair and equitable," or "just and reasonable" standards that have previously represented the outer limits of a constitutional delegation of legislative power. *See, e.g., Whitman*, 531 U.S. at 475-76 (statute required EPA "to set air quality standards at the level that is 'requisite' . . . to protect the public health with an adequate margin of safety"); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (statute directed agency to set prices that are "fair and equitable"); *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600-01 (1944) (statute directed agency to set rates that are "just and reasonable"); *National Broad. Co. v. United States*, 319 U.S. 190, 225 (1943) (statute directed agency to grant broadcast licenses in the "public interest"). In

contrast, Section 5 simply identified the beneficiaries on whose behalf the government should hold the land: "for Indians." 25 U.S.C. § 465. "[W]hen Congress authorize[d] the Secretary to acquire land in trust 'for Indians,' it [gave] the agency no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." *South Dakota I*, 69 F.3d at 883. Because Section 5 lacks any statutory standard allowing the Judicial branch to measure an agency's action and discern whether that action is in accord with Congressional will, this Court should hold Section 5 unconstitutional.

B. This Court Should Also Grant the Petition to Resolve a Circuit Conflict.

The Eighth Circuit in *South Dakota I* was the first appellate court to consider Section 5's constitutionality. Unable to discern an intelligible principle, the court was forced to conclude that Section 5 "define[s] no boundaries to the exercise of this [land acquisition] power." 69 F.3d at 882. "Indeed," the court observed, Section 5 would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." *Id.* "The result is an agency fiefdom." *Id.* at 885.

Before the Eighth Circuit's ruling, the Secretary of the Interior had taken the position that IRA land acquisitions were not subject to judicial review. *South Dakota I*, 519 U.S. at 920 (Scalia, J., dissenting).

Following the decision, the Department of the Interior promptly changed course and promulgated a new regulation providing for judicial review. The United States then petitioned this Court to vacate and remand the Eighth Circuit's decision, and this Court granted that request. *Id.* at 920-21.

In dissent, Justice Scalia, joined by Justices Thomas and O'Connor, urged the Court to hear the merits of the nondelegation challenge, finding it "inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals." *Id.* at 922-23. As 16 state *amici* aptly noted in support of the petition for certiorari in *Carcieri*, "No other court has challenged [the Eighth Circuit's conclusion in *South Dakota I*], or found any significant limitation on the trust power in the text of the IRA." Brief of the States of Alabama *et al.* as Amici Curiae Supporting Petitioners, *Carcieri v. Kempthorne*, No. 07-526, at 21 (Nov. 21, 2007).

On remand, a different Eighth Circuit panel upheld Section 5's constitutionality. *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 799 (8th Cir. 2005) [*South Dakota II*]. The *South Dakota II* panel invoked the same suspect historical and statutory "context" and legislative history that Judge Brown thoroughly discredited in her dissenting opinion. 423 F.3d at 797-99. And a primary motivator appeared to be the fact that this Court has struck down only two statutory provisions on nondelegation grounds, and not since 1935. *Id.* at 795. In fact, one or more of the

threads of this questionable analytical triumvirate – historical/statutory context, legislative history, and the length of time since the last successful nondelegation challenge – can be found in every circuit decision holding Section 5 constitutional. *See, e.g.*, App. 15a-20a; *Roberts*, 185 F.3d at 1137; *Carcieri*, 497 F.3d at 42-43.

The Eighth Circuit's decision in *South Dakota I* and Judge Brown's dissent below directly conflict with the suspect holdings of the First, Eighth, Tenth, and D.C. Circuits. But the conflict does not end there. In *Florida Department of Business Regulations v. United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), the Eleventh Circuit expressly held that Section 5 was an unreviewable exercise of discretion because the statute "does not delineate the circumstances under which exercise of this discretion is appropriate." *Id.* at 1256. Though not specifically resolving a nondelegation challenge, the Eleventh Circuit's decision in *Florida* is wholly consistent with the reasoning of *South Dakota I* and Judge Brown's dissent, furthering the split among the circuits. Given the post-*Whitman* trend in favor of upholding the statute, the split is unlikely to deepen. Further percolation in the lower courts will therefore not be beneficial unless and until this Court reaffirms the nondelegation doctrine's continuing vitality.

C. The Issues Presented by this Case Are of National Importance.

1. The current economic and political climate demonstrates the need for a constitutional check against unbridled delegations of legislative power.

"It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded." *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). That is why commentators have continued to urge this Court to revitalize the nondelegation doctrine, just as the Court used *United States v. Lopez*, 514 U.S. 549 (1995), to remind Congress that its powers under the Commerce Clause were in fact limited. *See* Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated. . . . A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior."); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351 (2002); *see also* Petition for Writ of Certiorari, *United States v. Roberts*, No. 99-991174, at 28 (Jan.

12, 2000) ("The importance of [whether Section 5 violates the nondelegation doctrine] is beyond cavil.").

The need for such a revitalization takes on special importance in the context of legislative proposals to address the current economic crisis. Some have compared the economic climate to the panic that gripped the country during the Great Depression, and it is no coincidence that it was Great Depression-era legislation that this Court last found violated the nondelegation principle. This Court's invalidation of Section 5 would have the important effect of forcing Congress to consider intelligible guiding principles as it grants unprecedented authority.

Of course, the mischief that can be wrought by an agency acting without an intelligible limiting principle can also be observed in non-crisis situations. For example, in *Shivwits*, 428 F.3d at 969-70, the Secretary accepted into trust two parcels of land that a tribe purchased using a loan from an advertising company. The tribe then leased the property back to the advertiser so the advertiser could construct billboards that would have otherwise been prohibited by state and local regulations. The transaction was deliberately structured to assist a private (non-tribal) company in evading state and local law; yet, the Secretary did not hesitate to take the land in trust.

This Court should take the opportunity presented by Section 5's bald statutory language to revitalize an important constitutional doctrine that still has an important role to play in our government

of separated powers. Indeed, even if the Court agrees with conventional wisdom that the nondelegation principle is a constitutional doctrine in permanent exile, then the doctrine should be given a proper, public burial.

2. The constitutional validity of Section 5 itself has independent, fundamental significance.

In *Whitman*, this Court held that the scope of discretion which can be delegated to administrators, consistent with the nondelegation doctrine, is dependent on the importance and potential impact of the program at issue. 531 U.S. at 475. Here, the monumental importance of Section 5 can hardly be overstated.

In its Petition for Certiorari in *South Dakota I*, the United States informed this Court that IRA is "one of the most important congressional enactments affecting Indians," "the cornerstone of modern federal law respecting Indians." Petition for Writ of Certiorari, *South Dakota v. U.S. Dep't of the Interior*, No. 95-1956 at 15, 16 (June 3, 1996). That statement is undeniably true. Because of IRA, the Bureau of Indian Affairs manages more than 50 million acres of land on behalf of more than 560 recognized Indian tribes.

The United States in *South Dakota I* also rejected as "unpersuasive" the state's argument that

Section 5's constitutionality lacks "national importance." Reply Br., *South Dakota v. U.S. Dep't of the Interior*, No. 95-1956 at 1 (Aug. 30, 1996). Again, that statement is undeniably true. When the Secretary takes land in trust, he strips away the host state's sovereignty and jurisdiction and places them in the hands of a competing sovereign, insulating the land from state and local taxation, 25 U.S.C. § 465 para. 4, and from state regulation, *see Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996). "Thus, the trust acquisition authority is a power to determine who writes the law, and thus indirectly what the law will be, for particular plots of land. The consequences of the Indian country designation are profound." App. 33a (Brown, J., dissenting).

In sum, one of the greatest powers – the evisceration of state jurisdiction – is coupled with an unlimited delegation of authority – to provide land "for Indians." In the United States' own words, "This Court has the overarching responsibility for determining conclusively whether Congress has overstepped constitutional limitations." Petition for Writ of Certiorari, *South Dakota v. U.S. Dep't of the Interior*, No. 95-1956 at 4 (June 3, 1996).

Importantly, the significance of Section 5's constitutionality is exponentially greater than the harm alleged in this particular case, which involves the environmental and societal impacts of a casino drawing more than 3 million visitors annually to a rural

community of only 3,000 residents. The next land-in-trust decision could involve, for example, the proposed placement of a tribal nuclear waste facility, exempt from any state or local zoning laws. Would the Congress that enacted IRA have approved of *that* proposed land use, even in the name of economic development? There is no intelligible principle to guide such an inquiry.

Ironically, as originally proposed, IRA contained standards which very likely would have rendered it constitutional.[2] While the original bill tried to articulate basic policy choices and impose real boundaries, the bill was gutted because legislators could not agree on its purpose. *Compare* Housing

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[2] The original draft of the bill provided for Indian lands in Title III. *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., 8 (1934) (hereinafter House Hearings). Section 1 set out a detailed declaration of policy. *Id.* Section 6 required the Secretary to "make economic and physical investigation and classification of the existing Indian lands, of intermingled and adjacent non-Indian lands and of other lands that may be required for landless Indian groups or individuals" and to make "such other investigations as may be needed to secure the most effective utilization of existing Indian resources and the most economic acquisition of additional lands." *Id.* at 8-9. The Secretary was further required to classify areas which were "reasonably capable of consolidation" and to "proclaim the exclusion from such areas of any lands not to be included therein." *Id.* at 8. Section 8 allowed the tribe to acquire the interest of any "non-member in land within its territorial limits" when "necessary for the proper consolidation of Indian lands." *Id.* at 9.

Hearings at 1-14 *with* 48 Stat. 984 (1934).[3] Because Congress deliberately eliminated all intelligible standards from the original bill's text, it can hardly be said that Congress articulated such standards in the 1934 legislative history. While Congress is empowered to enact legislation to address societal problems, it is Congress's responsibility to devise solutions that pass constitutional muster, and to specify those solutions in the statutory text, rather than ceding that authority to the Executive branch.

3. Indian gaming has created an enormous industry that is exempt from state and local regulation and taxation.

Casino gambling is "one of the nation's fastest growing industries." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999). From 1996 to 2006, tribal gaming revenues quadrupled from $6.3 billion to $25 billion, according to the National Indian Gaming Commission.[4] And the stratospheric growth shows no sign of slowing, as

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[3] The detailed statement of general policy for the Act as a whole was eliminated. Section 1 was entirely deleted. Section 7, the predecessor to 25 U.S.C. § 465, was stripped of standards and renumbered Section 5.

[4] *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/19962006revenues.pdf.

hundreds of tribes seek federal recognition, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts. Iver Peterson, *Would-Be-Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1.

As tribal gaming has become more widespread, so have the costs. "[S]tates now facing the biggest budget deficits are also the states with the largest number of tax-exempt Indian casinos and tax-evading tribal businesses." Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule.*, The American Enterprise, Sept. 2004, at 31. This regime raises serious federalism concerns, as noted by both Judge Brown in her dissent and the Eighth Circuit in *South Dakota I*. App. 34a ("[Section] 5 allows the Secretary, by taking land in trust for Indians, to oust state jurisdiction in favor of government by the beneficiaries he chooses."); 69 F.3d at 882 ("By its literal terms, the statute permits the Secretary to [take] a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls."). This Court should review the constitutionality of the Secretary's unlimited power to create islands of foreign sovereignty within states' borders.

II. UNDER THIS COURT'S PRECEDENTS, MICHGO IS ENTITLED TO THE BENEFIT OF ANY CHANGE IN LAW RESULTING FROM THE COURT'S DECISION IN *CARCIERI*.

MichGO requests that the Court grant certiorari on a second substantial question, the *Carcieri* issue that is already pending before the Court. That issue is whether the Secretary has the authority under Section 5 to take land in trust for Indian tribes that were not federally recognized in 1934, the year IRA became effective. *See* 25 U.S.C. § 479 (defining "Indian" as a member of any federally recognized Indian tribe "*now* under federal jurisdiction") (emphasis added). If the answer is "no," the land-in-trust decision in this case is invalid because the Tribe was not federally recognized in 1934. Although MichGO did not raise this argument in the District Court due to the overwhelming case law that had rejected it, this Court's precedents entitle MichGO to the benefit of any change in the law that results from *Carcieri*.

A. This Court's Precedents Support Applying Any New Rule Announced in *Carcieri* to this Pending Case.

It is well settled that a federal court must apply the law in effect at the time it renders its decision. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full

retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. Accordingly, once the Court issues its decision in *Carcieri*, the decision will apply to all pending cases, including this one.

MichGO attempted to raise the *Carcieri* issue in the D.C. Circuit immediately after this Court granted certiorari. The Tribe argued that MichGO had waived the issue by failing to raise it below, and the D.C. Circuit refused to consider it. But the Tribe's position is inconsistent with this Court's precedents concerning intervening changes of law. The Court has held that, to be effective, a waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A party does not waive a "known right" by failing to raise an issue that only became apparent as a result of an intervening court decision following trial. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-44 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Uebersee Finanz-Korporation, A.G. v. McGrath*, 343 U.S. 205 (1952); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

As Justice Black explained in *Standard Industries, Inc. v. Tigrett Industries, Inc.*, 397 U.S. 586 (1970) (judgment affirmed by an equally divided Court), "we have frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law since the trial.

The principle has not been limited to constitutional issues, and the Court has permitted consideration on appeal of statutory arguments not presented below." *Id.* at 587 (Black, J., dissenting) (citing cases). "In deciding whether such new arguments can be considered, we have primarily considered three factors: first, whether there has been a material change in the law; second, whether assertion of the issue earlier would have been futile; and third, whether an important public interest is served by allowing consideration of the issue." *Id.* at 587-88.

Applying these standards, the Court has allowed parties to raise new issues for the first time on appeal when a decision in another case has changed the legal landscape following trial. *See, e.g., Curtis Publishing*, 388 U.S. at 143-44; *Rosenblatt*, 383 U.S. at 87-88; *Uebersee Finanz-Korporation,* 343 U.S. at 212-13; *Hormel*, 312 U.S. at 558-60; and *Vanderbark*, 311 U.S. at 542-43. In *Curtis Publishing*, for example, the defendant in a libel suit raised the defense of substantial truth but not any constitutional defenses. 388 U.S. at 137. Shortly after trial, this Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which constitutionalized state libel law and required public officials to prove that defamatory statements were made with "actual malice." *Id.* at 279-80. The defendant immediately brought *New York Times* to the attention of the trial court, but the court denied a motion for a new trial and the Court of Appeals affirmed, holding that the defendant had waived the defense by failing to raise it at trial. *See id.* at 138-39.

This Court granted certiorari and reversed. *See id.* 143-44. The Court reasoned that the failure to raise a defense at trial "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Id.* at 143. The Court emphasized that, at the time of trial, "there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny," and thus it was reasonable for a lawyer trying a libel case to assert only state law defenses." *Id.* at 143-44. "We would not hold that [the defendant] waived a 'known right' before it was aware of the *New York Times* decision. It is agreed that [the defendant's] presentation of the constitutional issue after our decision in *New York Times* was prompt." *Id.* at 145; *accord Hormel*, 312 U.S. at 558-60 (allowing the government to raise new statutory argument on appeal following intervening Supreme Court ruling; any other holding "would defeat rather than promote the ends of justice"); *Rosenblatt*, 383 U.S. at 87-88 (holding that plaintiff was entitled to retrial of libel suit tried before *New York Times*); *Uebersee Finanz-Korporation*, 343 U.S. at 212-13 (permitting plaintiff to raise new argument created by "novel holding" of intervening Supreme Court decision).

The same is true here. If this Court decides the first question presented in *Carcieri* in Rhode Island's favor, the decision will effect an intervening change in law that MichGO could not have reasonably anticipated. MichGO cannot be said to have waived a "known right or privilege" by failing to raise a futile

argument. *See Curtis Publishing*, 388 U.S. at 145 & n.10 (noting that "it is almost certain that [the trial judge] would have rebuffed any effort to interpose constitutional defenses" before the *New York Times* ruling); *Youakim v. Miller*, 425 U.S. 231, 235 (1976) (permitting plaintiffs to raise a supremacy clause argument for the first time on appeal when it would have been futile to raise the issue below).

B. Applying *Carcieri* Here Works No Unfairness and Advances the Public Interest.

Allowing MichGO to raise the *Carcieri* issue will not prejudice the Tribe or Federal Defendants. MichGO promptly raised the issue in the Court of Appeals as soon as this Court announced its grant of certiorari in *Carcieri*. *See Curtis Publishing*, 388 U.S. at 145. Moreover, there is no dispute regarding the Tribe's recognition status – both the Tribe and the Federal Defendants concede that the Tribe was not federally recognized in 1934.

As in *Curtis Publishing*, the lower courts here did not have the benefit of whatever ruling this Court might make in *Carcieri*. To hold that MichGO waived the argument would "defeat rather than promote the ends of justice," *Hormel*, 312 U.S. at 559, because it would result in the government taking land in trust for the Tribe when the Tribe was not recognized in 1934 and is thus ineligible under the statute. It would be incongruous for an issue of such magnitude not to

apply to this pending case simply because the issue did not become apparent until after the District Court issued its ruling. The Tribe should not be permitted to escape the impact of *Carcieri* when that decision will affect all other tribes with pending land-in-trust applications or that apply for land under Section 5 in the future, as *Harper* requires. 509 U.S. at 97.

Finally, allowing MichGO to raise *Carcieri* will cause no inefficiency or delay. The case presents a pure legal question and there is no factual dispute about the Tribe's recognition status. If the Court rules in Rhode Island's favor in *Carcieri*, the decision will be dispositive here because it is undisputed that the Tribe was not federally recognized in 1934.

In sum, MichGO respectfully requests that the Court apply *Carcieri* here and summarily reverse and remand to the D.C. Circuit. If necessary, MichGO requests that the Court hold this petition in abeyance until the Court has issued its ruling in *Carcieri*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 23, 2008

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 2007 Decided April 29, 2008

No. 07-5092

Michigan Gambling Opposition,
A Michigan Non-profit Corporation,
Appellant

v.

Dirk Kempthorne, In his official capacity as
Secretary of the United States
Department of the Interior, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 05cv01181)

John J. Bursch argued the cause for appellant. With him on the briefs were Rebecca A. Womeldorf, Daniel P. Ettinger, and Joseph A. Kuiper.

Aaron P. Avila, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief was Elizabeth A. Peterson, Attorney. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Nicholas C. Yost, Seth P. Waxman, Edward C. DuMont, Demian S. Ahn, and Conly J. Schulte were on the brief for appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians.

Before: GINSBURG, ROGERS and BROWN, Circuit Judges.

Opinion for the Court filed PER CURIAM.

Opinion dissenting in part by Circuit Judge BROWN.

PER CURIAM: In 2005, the Assistant Secretary for Indian Affairs of the Bureau of Indian Affairs of the Department of Interior decided to take 147 acres of land in Wayland Township, Michigan, into trust for use by the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("the Tribe"), which plans to construct and operate a Class III casino. This decision followed federal recognition of the Tribe in 1998. A non-profit Michigan membership organization – Michigan Gambling Opposition ("MichGO") – sued the Secretary of the Interior, the Bureau of Indian Affairs ("BIA") and the National Indian Gaming Commission ("NIGC") (collectively the "DOI") alleging that the DOI's approval of the proposed casino violated the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 et seq., and that section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, was unconstitutional. The district court granted summary judgment to the DOI, and MichGO appeals. We hold that the DOI did not violate NEPA and that

section 5 of the IRA is not an unconstitutional delegation of legislative authority. Accordingly, we affirm.

I.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians has lived in Michigan continuously since it emerged as a recognizable unit under Chief Match-E-Be-Nash-She-Wish at the turn of the nineteenth century. At that time, the Tribe lived near Kalamazoo, Michigan, along the Kalamazoo River. The Tribe was party to several treaties with the United States, and it was adversely affected by several others, with the result that it lost all of its lands near Kalamazoo by the middle of the nineteenth century. It avoided being moved to reservations further west by taking asylum with a church mission in central Michigan, near the town of Bradley. Around the end of the nineteenth century, land in the church mission was distributed to individual members of the Tribe. This distribution was in accord, although not directly part of, broader federal policies of the time, which emphasized breaking up tribal holdings and distributing parcels of land to individuals. *See* Judith V. Royster, *The Legacy of Allotment,* 27 ARIZ. ST. L.J. 1, 10-12 (1995). Most of the land distributed to individual members of the Tribe was lost because of failure to pay property taxes, as was the case for large portions of the land distributed under broader federal policies, *id.* at 12, but members of the Tribe continued to reside around the former church mission.

The Tribe, now numbering 277 members, secured federal acknowledgment of its existence in 1998, under the BIA's formal recognition procedure. The Tribe and BIA plan for BIA to acquire land as a reservation for the Tribe, using the Secretary of the Interior's authority under section 5 of the IRA to take land into trust for Indians, 25 U.S.C. § 465. They have identified a 147-acre tract of land ("the Bradley property") that they find suitable for this purpose. The Bradley property is located in Wayland township (population 3,013), a largely rural area about twenty-five miles north of Kalamazoo and thirty miles south of Grand Rapids. Seeking to advance the economic well-being of its members, who suffer from unemployment rates approximately six times the average of their surrounding area, and to promote economic self-sufficiency, the Tribe plans to use the Bradley property to host a Class III gambling casino. The planned facility would comprise approximately 99,000 square feet of gambling, with additional floor space devoted to restaurants, stores, and offices. The Tribe expects 8,500 visitors per day.

As BIA studied the Tribe's proposal, it prepared an environmental assessment ("EA") under the auspices of NEPA, 42 U.S.C. § 4321 et seq. The EA analyzed the effects the proposed casino would have on area wildlife, air and water; farming in the vicinity; and nearby communities. One of the issues addressed by the EA was the possibility that the casino would increase local traffic. The EA used the U.S. Department of Transportation ("DOT") grading system to

assess the severity of potential traffic delays: "Level Of Service A" means free passage, while "Level of Service F" means a driver can expect to wait eighty seconds or more before passing through an unsignaled intersection. The EA defined acceptable traffic delays to be "Level of Service C" or better. However, because Michigan does not grade intersections, the BIA concluded that approval by the Michigan Department of Transportation ("MDOT") would also qualify an intersection's traffic levels as acceptable.

Applying the DOT classification system, a study commissioned as part of the EA identified two local intersections where increased casino-related traffic would result in Level of Service F at certain times. These intersections sit at the junction of US-131, a limited access highway that runs north and south along the west edge of the Bradley property, and Michigan-179 (129th Avenue), a two-lane road that runs east and west along the south edge of the Bradley property. The study predicted that the casino would cause heavy traffic at the right turn from the northbound exit onto 129th Avenue (eastbound) and at the left turn from the southbound exit onto 129th Avenue (eastbound). Resulting delays would be particularly severe during afternoon rush hours.

To mitigate the traffic impact of the casino, the EA recommended construction of a new, dedicated right-turn lane for the northbound intersection and adding a four-way stop to the southbound intersection. It acknowledged the southbound left turn would still operate during peak periods at Level of Service F,

so that a traffic light might be necessary. Although MDOT apparently will not commit to a traffic light based on predictions of traffic volume, it apparently would approve a dedicated right turn lane and a four-way stop.[1]

Having concluded that proposed measures would sufficiently alleviate traffic delays and that other potential problems identified in the EA would also be mitigated, the BIA and the NIGC both issued Findings of No Significant Impact ("FONSI") with respect to the casino project and announced their intent to acquire the Bradley property and allow the casino.

MichGO filed this lawsuit in June 2005, advancing four claims. The first alleged that the preparation of a FONSI rather than an environmental impact statement ("EIS") violated NEPA. The second and third alleged violations of the Indian Gaming Regulatory Act ("IGRA"). The fourth alleged that the IRA is an unconstitutional delegation of authority to the Secretary of the Interior because there is no

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[1] The EA relied on a September 25, 2001, letter from MDOT, which approved the dedicated right-turn lane; this letter did not expressly mention the four-way stop or any of the traffic study's conclusions. Letter from Robert Coy, Region Permit Agent, MDOT, to Marc Start, URS Corporation (Sept. 25, 2001). However, a letter from MDOT to the Tribe on February 12, 2002, cited the completed traffic study and approved its recommendations, which included the four-way stop. Letter from Robert Coy, Region Permit Agent, MDOT, to D.K. Sprague, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, Gun Lake Tribe (Feb. 12, 2002).

intelligible principle limiting its discretion on what land to acquire and hold in trust. The Tribe was allowed to intervene as a defendant. The district court granted summary judgment to the DOI on February 23, 2007. *Mich. Gambling Opposition (MichGO) v. Norton,* 477 F. Supp. 2d 1, 22 (D.D.C. 2007). MichGO appeals and our review is de novo. *Sample v. Bureau of Prisons,* 466 F.3d 1086, 1087 (D.C. Cir. 2006). However, in view of *Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460 (D.C. Cir. 2007), MichGO does not pursue its IGRA claims. Appellant's Reply Br. 2 n.1.

II.

NEPA requires every agency proposing a "major Federal action" to prepare a statement of its environmental impact if the action will "significantly affect[ ] the quality of the human environment." 42 U.S.C. § 4332(C). Under regulations promulgated by the Council on Environmental Quality ("CEQ") agencies must create procedures identifying "[s]pecific criteria for and identification of those typical classes of action" that require or do not require an EIS. 40 C.F.R. § 1507.3(b)(2). In considering any particular proposed action, an agency must first determine whether, under its own regulations, the proposal would "[n]ormally require[ ] an [EIS]" or "[n]ormally [would] not require either an [EIS] or an [EA]." *Id.* § 1501.4(a). If the proposed action is not covered by either of these descriptions, the agency should prepare an EA, and based on its conclusions, decide

whether to prepare an EIS. *Id.* §§ 1501.4(b)-(c). The agency may conclude that an EIS is not necessary and instead issue a FONSI, in which it must explain why there will be no significant impact. *Id.* §§ 1501.4(e); 1508.13.

A.

MichGO contends that the Tribe's casino is large and controversial, and that the DOI is thus required by law to prepare an EIS. To support this contention, MichGO relies on the 2005 "Checklist for Gaming Acquisitions," distributed to regional directors by the BIA, which provides that "[p]roposals for large, and/or potentially controversial gaming establishments should require the preparation of an EIS."[2] MichGO maintains that 40 C.F.R. § 1501.4(a) requires an EIS to be performed if mandated by internal DOI guidelines such as the Checklist.

The premise underlying MichGO's contention is flawed. Section 1501.4(a) does not make the Checklist binding on the DOI. The CEQ does require each agency to "[d]etermine under its procedures" whether a project is of a type that normally requires an EIS. *Id.* § 1501.4(a). But it also specifies that these procedures will be established pursuant to section 1507.3. *Id.* Section 1507.3 sets out a specific process for

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[2] OFFICE OF INDIAN GAMING MGMT., DEP'T OF THE INTERIOR, CHECKLIST FOR GAMING ACQUISITIONS GAMING-RELATED ACQUISITIONS AND IGRA SECTION 20 DETERMINATIONS 10 (2005) ("Checklist").

developing the relevant agency procedures; as part of this process, the CEQ must approve the procedures before they are implemented. *Id.* § 1507.3(a). The DOI complied with these requirements when it established its NEPA procedures, now codified in its manual. DEP'T OF THE INTERIOR, DEPARTMENT MANUAL, Pt. 516, Chpt. 10 (May 27, 2004). These procedures do not encompass the Checklist, which in any event does not appear to have been approved by the CEQ as required by section 1507.3(a). The manual does, however, include lists of activities that under its procedures normally require or do not require an EIS or EA. *Id.* Gaming activities are not included in these lists. In these circumstances, the section 1501.4(b)-(c) process – EA preparation followed by a decision on whether to prepare an EIS – is applicable. The DOI followed these procedures and lawfully determined not to prepare an EIS on the basis of the EA.[3]

Because we are unpersuaded that the Checklist is binding on the DOI, we do not reach MichGO's contention that the casino project at issue is "large" and "controversial" within the meaning of the Checklist.

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[3] MichGO's suggestion in its brief that the Checklist is binding independent of 40 C.F.R. § 1501.4 is not appropriately developed and thus not properly before the court. *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). MichGO also maintains that ignoring non-binding regulations is arbitrary and capricious, but this contention is waived as it is raised only in the reply brief. *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

B.

Alternatively, MichGO contends that it was arbitrary or capricious for the DOI to issue a FONSI without having prepared an EIS because two intersections would continue to experience Level of Service F at certain times, even after mitigation measures.[4]

A court reviews an agency's FONSI or EIS under the Administrative Procedure Act, 5 U.S.C. § 706, and "cannot substitute [its] judgment for that of an agency if the agency's decision was 'fully informed and well considered.'" *Cabinet Mountains Wilderness v. Peterson,* 685 F.2d 678, 684 (D.C. Cir. 1982) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558 (1978)). If the agency decided to issue a FONSI, it must either have concluded there would be no significant impact or have planned measures to mitigate such impacts. A court must review whether the agency:

> (1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its EA, (3) is able to make a convincing case for its finding of no significant impact, and (4) has

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[4] MichGO maintains in a footnote of its initial brief and in its Reply Brief that increased traffic in the Village of Hopkins will constitute a significant, unmitigated impact. We do not consider this argument. "[A]bsent extraordinary circumstances . . . we do not entertain an argument raised for the first time in a reply brief . . . or . . . a footnote." *United States v. Whren,* 111 F.3d 956, 958 (D.C. Cir. 1997).

> shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum.

TOMAC v. Norton, 433 F.3d 852, 861 (D.C. Cir. 2006) (internal quotations omitted).

The EA found that at least one intersection would experience Level of Service F at certain times even after mitigation measures. However, contrary to the assumption underlying MichGO's contentions, the EA's definition of acceptable traffic performance was not based solely on the level-of-service classification. Rather, the EA noted that local authorities had no standards for traffic intensity; thus the EA deployed two separate indicators as proof of acceptable traffic conditions: either Level of Service C or above *or* approval by relevant local authorities. MDOT, the agency with jurisdiction over these roads, found the traffic levels projected after the DOI's mitigation measures would be acceptable. It was not inherently arbitrary or capricious for the DOI to rely on MDOT's assessment, *cf. Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 237 (5th Cir. 2006), and MichGO gives us no reason to question that reliance. The DOI was thus justified in finding that mitigation of the traffic impact was sufficient, and that an EIS was unnecessary.

III.

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art I, § 1. In considering a challenge to a delegation of power, "the test is whether Congress has set forth 'an intelligible principle to which the person or body authorized to act is directed to conform.'" *TOMAC,* 433 F.3d at 866 (quoting *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001) (alterations and internal quotations omitted)). The Supreme Court has underscored that "the general policy and boundaries of a delegation 'need not be tested in isolation' . . . [as] the statutory language may derive content from the 'purpose of the Act, its factual background and the statutory context.'" *Id.* (quoting *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 104 (1946)). Courts "have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman,* 531 U.S. at 474-75 (internal quotations omitted).

MichGO contends that section 5 of the IRA is an unconstitutional delegation of legislative power because, apart from the DOI's internal regulations, which cannot fill the void, it is "completely devoid of intelligible standards to guide or limit the Secretary's discretion." Appellant's Br. at 35. We are not convinced. An agency cannot "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power," *Whitman,* 531 U.S. at 473, as the district court incorrectly suggested,

MichGO, 477 F. Supp. 2d at 21-22. But giving due consideration to the purpose and factual background of the IRA and section 5's statutory context, as the Supreme Court instructs, *see Am. Power & Light Co.*, 329 U.S. at 104, and having due regard that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion," *Yakus v. United States*, 321 U.S. 414, 425-26 (1944), we conclude the statute provides an intelligible principle.[5]

Section 5 of the IRA authorizes the Secretary of the Interior to obtain land "for Indians."[6] 25 U.S.C.

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[5] Hence the court has no occasion to address the Tribe's contention that the non-delegation doctrine is inapplicable because section 5 of the IRA does not involve a delegation of legislative power.

[6] Section 5 of the IRA provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year. . . .
>
> . . .

(Continued on following page)

§ 465. This court has not previously considered whether section 5 constitutes an unconstitutionally standardless delegation of power. But on its face, the delegation is no broader than other statutes, which the Supreme Court has upheld, that direct agencies to act in the "public interest," *Nat'l Broad. Co. v. United States,* 319 U.S. 190, 216 (1943), or in a way that is "fair and equitable," *Yakus,* 321 U.S. at 420, *see also Whitman,* 531 U.S. at 473-75. Furthermore, the courts of appeals for the First, Eighth and Tenth Circuits have rejected challenges contending that section 5 is an unconstitutional delegation. *See Carcieri v. Norton,* 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc), *cert. granted in part, denied on non-delegation issue,* 128 S. Ct. 1443 (2008); *South Dakota v. U.S. Dep't of Interior,* 423 F.3d 790, 799 (8th Cir. 2005); *United States v. Roberts,* 185 F.3d 1125, 1137 (10th Cir. 1999). These courts have held "that an intelligible principle exists in the statutory phrase 'for the purpose of providing land for Indians' when it is viewed in the statutory and historical context of the IRA." This principle involves "providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from . . . prior [federal policy]." *South Dakota,* 423 F.3d at 799

> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465.

(quoting 25 U.S.C. § 465); *accord Carcieri,* 497 F.3d at 42; *Roberts,* 185 F.3d at 1137.

Our review of the purpose and structure of the IRA confirms that, as our sister courts have held, and contrary to the view of our dissenting colleague, the statute provides an intelligible principle rather than a tautology when it authorizes the Secretary to acquire land "for the purpose of providing land for Indians": the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes. *Cf.* Dissenting Op. at 7-8. The Supreme Court has noted that "[t]he intent and purpose of the [IRA] was to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973) (internal quotations omitted). This accords with the IRA's stated purpose of "conserv[ing] and develop[ing] Indian lands and resources; . . . extend[ing] to Indians the right to form business and other organizations; . . . establish[ing] a credit system for Indians; . . . grant[ing] certain rights of home rule to Indians; . . . and [effectuating] other purposes." Pub. L. No. 383, 48 Stat. 984, 984 (1934).

In addition to section 5, the IRA includes numerous other provisions addressing land use and economic development; among other things, these extend tribal trusts indefinitely, 25 U.S.C. § 462; restore lands previously declared "surplus" to those trusts, *id.* § 463; restrict land transfers from tribal reservations, *id.* § 464; and provide federal appropriations to

support Indian economic development, *id.* § 470. This context underscores section 5's role as part of a broad effort to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies. The Supreme Court has acknowledged this emphasis, explaining that the IRA's passage brought "an abrupt end" to the previous federal "policy of allotment" that had led to individuals who were not American Indians acquiring "over two-thirds of the Indian lands allotted." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 255 (1992). The Court also emphasized that through the IRA Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized" earlier federal policy. *Id.*

The standards revealed by examining the purpose and structure of the IRA are confirmed by reviewing the broader factual context of the statute. The IRA was enacted against a backdrop of great concern over economic and social challenges facing American Indians, and especially over the consequences of the federal government's allotment policy, which had resulted in many tribal lands being distributed to individuals who then lost control of them, often because of fraud or inability to pay taxes. Royster, 27 ARIZ. ST. L.J. at 12. By 1928, a report commissioned by the Secretary of the Interior found that the allotment policy had "destructive effects . . . on the economic, social, cultural and physical well-being of

the tribes." *Id.* at 16. As both the Supreme Court, *Mescalero Apache Tribe,* 411 U.S. at 152, and circuit courts, *South Dakota,* 423 F.3d at 798; *Carcieri,* 497 F.3d at 42, have acknowledged, the legislative history of the IRA also underscores its purpose of addressing economic and social challenges facing American Indians by promoting economic development. *See* H.R. Rep. No. 73-1804, at 6 (1934); S. Rep. No. 73-1080, at 1-2 (1934).[7]

There is nothing to suggest that section 5 is removed from the overall IRA purpose of advancing economic development among American Indians. While certain sections of the IRA include more specific language than section 5, *see, e.g.,* 25 U.S.C.

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[7] The IRA's provisions constitute one chapter in a long and complicated history of interactions between the United States and American Indians. Our dissenting colleague asserts a trust relationship arises between the Indians and the United States only after the Government acquires land for the Indians, Dissenting Op. at 6, but this confuses the fiduciary relationship that arises because the United States is to hold newly-acquired land "in trust" under section 5 of the IRA, *see Cobell v. Norton,* 240 F.3d 1081, 1088 (D.C. Cir. 2001); *see also United States v. Wilson,* 881 F.2d 596, 600 (9th Cir. 1989), with the pre-existing "special relationship" that arose by virtue of the Government's historical relations with the Indians, *see* 1 FELIX R. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a] (2005) ("HANDBOOK"). That unique history informs our understanding of section 5 of the IRA; a statute authorizing the acquisition of land "for the purpose of providing land for Indians" is simply not the same as a statute authorizing the acquisition of land "for the purpose of providing land for persons taller than 6 feet." *See generally* Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 STAN. L. REV. 1213 (1975).

§ 463, this does not detract from the overall purposes of the statute. Although, as our dissenting colleague suggests, particular clauses of the IRA could be interpreted as not advancing the goal of economic development, not alleviating all the problems caused by the allotment policy, or advancing goals more narrow than general economic development, Dissenting Op. at 5-7, this analysis ignores the unambiguous purpose of the IRA as a whole.

Finally, we note that the Supreme Court has observed that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. The scope of authority delegated to the Secretary under section 5 – to decide whether to grant status as "Indian Country" to specific plots of land owned by Indians or that is acquired for them – is not so broad as to require limiting principles more specific than pursuing Indian economic development. Our conclusion is underscored by examining historical and contemporary context. The Executive has historically enjoyed extensive authority in conducting relations with American Indians, which has included negotiating treaties with Indian tribes and granting reservations to them by executive order. *See, e.g.*, HANDBOOK, *supra*, §§ 1.03; 15.04[4]; *cf. Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965). "[E]ven in sweeping regulatory schemes . . . statutes [are not required to] provide a determinate criterion" delimiting precisely how much of a good or harm an agency must address. *Whitman*, 531 U.S. at 475 (internal quotations omitted). Our

dissenting colleague asserts that the Secretary's powers under section 5 are vast, Dissenting Op. at 38-40, pointing to the many significant consequences that flow from the Secretary's decision to accept land in trust for the Indians. But these consequences follow from section 5 and from other statutes, not from the decision of the Secretary to acquire land in trust, for section 5 gives the Secretary no power to regulate state taxing authority or anything else. Our dissenting colleague further faults Congress for not providing a narrower standard, but Congress must provide only an "intelligible" standard, *Whitman*, 531 U.S. at 474-75. That standard need not be utterly unambiguous, for it is settled that Congress may delegate interstitial lawmaking authority to executive agencies. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[8]

For these reasons, we join the First, Eighth and Tenth Circuits, *Carcieri*, 497 F.3d at 43; *South Dakota*, 423 F.3d at 799; *Roberts*, 185 F.3d at 1137, in upholding section 5 of the IRA. In cases entertaining (and rejecting) challenges asserting an unconstitutional delegation, the Supreme Court has "giv[en]

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[8] Nor are we concerned, for purposes of the non-delegation doctrine, that the Secretary's decision to take land in trust might be unreviewable in a court of law. Dissenting Op. at 7-8 (citing *State of Fla., Dep't of Bus. Regulation v. U.S. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985)). Section 5 of the IRA intelligibly guides the Secretary's exercise of discretion, and that is all that the non-delegation doctrine requires. *Yakus*, 321 U.S. at 425-26; 5 U.S.C. § 701.

narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional," *Mistretta v. United States,* 488 U.S. 361, 373 n.7 (1989), and has done so by looking at clauses that neighbor the delegation of power, *e.g., Am. Power & Light Co.,* 329 U.S. at 104-05, as well as the statute's overriding purpose, *e.g., N.Y. Cent. Sec. Corp. v. United States,* 287 U.S. 12, 24-25 (1932). Congress may legislate its goals explicitly, *see, e.g., Mistretta,* 488 U.S. at 374, but it need not do so. We thus hold, relying upon the text, structure, and purpose of the IRA, as well as the context of its enactment, that section 5 contains an intelligible principle and that it is not an unconstitutional delegation of legislative authority.

Accordingly, we affirm the grant of summary judgment.

BROWN, *Circuit Judge*, dissenting in part: I join Parts I and II of the court's opinion, but I cannot agree § 5 of the IRA is constitutional. Consequently, I dissent from Part III.

I

Like other courts that have rejected nondelegation challenges to § 5, *Carcieri v. Kempthorne,* 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc); *South Dakota v. U.S. Dep't of the Interior,* 423 F.3d 790, 799 (8th Cir. 2005); *United States v. Roberts,* 185 F.3d 1125, 1137

(10th Cir. 1999), the majority nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. It conjures standards and limits from thin air to construct a supposed intelligible principle for the § 5 delegation. Although I agree the nondelegation principle is extremely accommodating, the majority's willingness to imagine bounds on delegated authority goes so far as to render the principle nugatory. Analyzing the statute using ordinary tools of statutory construction, as the Supreme Court has always done in nondelegation cases, I am forced to conclude § 5 is unconstitutional.

The nondelegation doctrine prohibits Congress from making unbridled delegations of authority. The rule is not only a fundamental aspect of the separation of powers; it is an essential feature of democratic government. "[T]he delegation doctrine[ ] has developed to prevent Congress from forsaking its duties." *Loving v. United States,* 517 U.S. 748, 758 (1996). "[T]he constitutional question is whether the statute has delegated legislative power to the agency . . . [The Constitution's] text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001); *see also Mistretta v. United States,* 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers. . . ."); *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power. . . ."). The nondelegation principle is integral to any notion of democratic accountability.

Thus, when Congress directs an agency to exercise its judgment, it must guide that judgment in some way. I agree with the majority that the nondelegation principle is not an onerous requirement. Nevertheless, Congress must at least "clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta,* 488 U.S. at 372-73; *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946). The central question is whether there are "limits on [an agency's] discretion." *Whitman,* 531 U.S. at 473.

Like the majority, I take *Whitman* to have identified two ways in which Congress may provide the necessary bounds on a delegation: standards to guide an agency's judgment or, in their absence, stringent limits on the scope of the delegated authority. Standards to guide an agency are the ordinary way to limit its discretion. In the leading case, *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court invalidated § 3 of the National Industrial Recovery Act, which allowed trade associations to develop codes of fair competition the President could adopt as law, with conditions as he thought "necessary." 295 U.S. 495, 522-23, 542 (1935). This statute was flawed because it "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman,* 531 U.S. at 474. Alternatively, "Congress need not provide any direction" if the "scope of the power congressionally conferred" is sufficiently small. *Id.* at 475. Either type

of limit suffices on its own, but at least one must be present.

Thus, the "intelligible principle" required of a constitutional delegation is fairly minimal: a statute will fail only if it gives an agency too broad an authority with no standards to guide the agency's decisions. Section 5 is a rare example of a standardless delegation, allowing the Secretary of the Interior to take land in trust for whichever Indians he chooses, for whatever reasons. This power is far too broad in scope for Congress to have delegated without any standards.

II

A

First, § 5 lacks standards to guide the Secretary in the exercise of his authority. Such standards would not have to provide a "determinate criterion" to govern agency decisions, as long as they provide "substantial guidance." *Whitman,* 531 U.S. at 475. Standards need only provide some criteria, some guidelines, or some direction, so that when an agency exercises its judgment, the agency and the courts have some "intelligible principle" by which to gauge whether the agency's decision will further the purpose of the delegation. For example, to guide the Sentencing Commission, "Congress directed it to consider seven factors," listed in the statute. *Mistretta,* 488 U.S. at 375. In *Whitman,* the Clean Air Act required the EPA "to set air quality standards at the

level that is 'requisite' . . . to protect the public health with an adequate margin of safety." 531 U.S. at 475-76.

"Whether [a] statute delegates legislative power is a question for the courts," *Whitman,* 531 U.S. at 473, and the purpose of an intelligible principle is to make sure it is not "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States,* 321 U.S. 414, 426 (1944). Congress must provide *legal* standards because "[p]rivate rights are protected by access to the courts to test the application of the policy in the light of" the standards. *Am. Power & Light Co.,* 329 U.S. at 105. Thus, since Congress must lay down these standards by "legislative act," *Mistretta,* 488 U.S. at 372, we should seek standards for a delegation using the ordinary tools of statutory construction.

The kinds of tools the majority uses are occasionally appropriate aids for ascertaining the meaning of ambiguous statutory text. On the other hand, when a standard is not ambiguous, but simply absent, we may not supply one by ourselves. *See Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992); *Gen. Elec. Co. v. EPA,* 360 F.3d 188, 191 (D.C. Cir. 2004). The majority not only supplies an absent standard, it actually invents the standard, imbuing § 5 with a spirit of "economic development" that somehow emanates from the context of the IRA.

In many nondelegation cases, Congress at least hints at a standard by directing an agency to exercise

its authority "in the public interest" – words indicating some congressionally imposed limit, even if the vagueness of the phrase makes a court work to interpret it. Here, by contrast, the Secretary "is authorized" to acquire land for Indians "in his discretion." Rather than an ambiguous standard that requires interpretation, § 5 provides an obvious, unambiguous direction that the Secretary is to have complete discretion.

The majority proceeds, in the teeth of this clear text, to find, in the emanation from a variety of sources, the supposed true intelligible principle behind § 5: promoting Indian economic development so Indians can achieve "self-support," and recouping losses of land. But this standard arises from the majority's imagination, not from the sources.

First, the court cites the preamble to the IRA: "to conserve and develop Indian land and resources." Maj. Op. at 13. A policy of developing land is no more informative than a purpose of providing land, as a standard to help the Secretary decide whether to acquire a particular parcel. Nor do the preamble's policies of "extending the right to form business[es] . . . establishing a credit system," and the rest, give any better direction.

Second, the majority examines the structure of the IRA. Maj. Op. at 13. Among its many provisions, the IRA makes trust status permanent, §§ 2 and 4, and provides for the recovery of Indian lands that had been opened for sale, § 3. Ironically, the restoration of

lands under § 3 is not automatic, but rests in the Secretary's hands. Unlike § 5 acquisitions, the Secretary is to restore surplus lands "if he shall find it to be in the public interest." Ordinarily, a comparison of § 3 and § 5 would lead us, first, to conclude § 5 gives the Secretary authority to acquire new land, and, second, to construe § 5 to grant Secretary broader discretion when he acquires new land than when he restores surplus land. Instead the majority reads into § 5 an "emphasis" on recouping losses of land, an emphasis the text does not support. The majority also sees an emphasis on preventing losses of existing land, even though § 8, which declares that the IRA shall not cover "Indian holdings of allotments or homesteads upon the public domain outside" of reservations, actually limits the effect of the IRA on existing Indian land. Nor is it plausible to find a principle of "self-support" in a statute that actually installs a paternalistic scheme of government support. *See* § 4 (barring Indians from selling or transferring their trust land); § 12 (directing the Secretary to establish preferences for hiring Indians at the Indian Office); § 11 (appropriating money to send Indians to "vocational and trade schools" of which only a limited amount may be spent for education in "high schools and colleges"); § 6 (establishing the Secretary's authority over how Indians should manage their forests and how many cows they may graze on their pastures).

The majority also cites the special trust relationship the United States bears towards Indians, waving

the idea of this relationship as a talisman to bless the statute rather than actually using it to interpret the text. Nor could this trust relationship be useful to interpret § 5, because in fact the government has no free-standing duty, outside of specific statutes, treaties, or executive orders, to ensure its actions do not harm Indian interests. *N. Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980) (Secretary's trust obligations, if any, were coterminous with the ESA's requirements); *see also United States v. Wilson*, 881 F.2d 596, 600 (9th Cir. 1989) ("Absent . . . a fiduciary duty based on an authorizing document such as a statute or a regulation . . . there can be no trust relationship between [a tribe] and the BIA."). The only trust responsibility created by § 5 exists *after* the government acquires a parcel of land and therefore cannot guide the Secretary's decision *whether* to acquire the parcel. The majority adverts to the "unique history" of Indians in the United States, but this history gives rise only to "a moral obligation, without justiciable standards for its enforcement." Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227 (1975). At best, courts distinguish statutes relating to Indians by applying the Indian canon of construction, *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992), but "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

To summarize, the statutory language lacks any discernible boundaries. To rely on the purpose of "providing land for Indians" does nothing to cabin the Secretary's discretion over providing land for Indians because it is tautological. To say the purpose is to provide land for Indians in a broad effort to promote economic development (with a special emphasis on preventing land loss) is tautology on steroids. Making a different selection from the same smorgasbord, I might posit quite different principles – to provide land for landless Indians; to acquire trust lands to be used for farming; to supplement grazing and forestry lands; to provide lands in close proximity to existing reservations; to consolidate checkerboarded reservations. All of these goals would be reasonable, but none can be derived from the text of the IRA. The very fact that so many standards can be proposed merely highlights the fact that the statute itself fails to describe how the power conveyed is to be exercised. Thus, the Secretary's assertion of unguided power is not subject to any judicial check; nor, conversely, can he be required to act whenever he voluntarily refrains from using his discretionary power.

Even if this mood of economic self-sufficiency can be said to permeate § 5, it has never constituted a standard to guide the Secretary's decisions. Courts, like the BIA, have consistently interpreted the statute to mean what it says: the Secretary has unfettered discretion over which land to take in trust. *See, e.g., State of Fla., Dep't of Bus. Regulation v. U.S. Dep't of the Interior,* 768 F.2d 1248 (11th Cir. 1985)

(Secretary may waive BIA regulations to acquire land for a tribal museum, and the court may not review his decision because it is committed to agency discretion). Again and again, courts have rejected challenges to acquisitions as beyond the Secretary's power, concluding that the "deliberately broad and flexible grant of power" in § 5, *Stevens v. Comm'r of Internal Revenue,* 452 F.2d 741, 748 (9th Cir. 1971), encompasses any possible acquisition. *E.g., Chase v. McMasters,* 573 F.2d 1011, 1015-16 (8th Cir. 1978) ("Congress did not limit the Secretary's discretion to select land for acquisition"; therefore, it was valid to accept land an Indian already owned and was giving to the United States in trust solely for the purpose of avoiding property taxes). The BIA has also regarded the Secretary's discretion as absolute, and its review board may only verify whether BIA considered the factors laid out in its own regulations. *Eades,* 17 I.B.I.A. 198, 200 (1989). Most recently, BIA has begun to deny trust applications for building casinos if it finds the casinos to lie beyond a "commutable" distance from tribes' existing reservations. *See* Memorandum from Carl Artman, Ass't Sec'y of the Interior, on Taking Off-Reservation Land into Trust for Gaming Purposes 1, 3 (Jan. 3, 2008) ("The decision whether to take land into trust . . . is discretionary with the Secretary.").[1]

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[1] BIA denies these applications because for far-away applications, the benefit to Indians does not outweigh the "concerns of state and local governments." *Id.* at 5 (citing 25

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In light of this history, it is a bit late for the court to claim there is in fact a standard, however loose, to which the Secretary must conform in his exercise of § 5 authority. Nor, given the weight of precedent, would I expect any court to apply the majority's "economic development with special emphasis" standard in reviewing an acquisition decision.

My point here is not to quibble with the majority's conclusion that the purpose of § 5 is to enable self-support rather than dependency or to prevent losses rather than acquire new land. Rather, the court should not be playing this game at all. Indeed, the court's approach differs radically from the Supreme Court's analytical process in nondelegation challenges. For example, in the *Intermountain Rate Cases*, the Court, recognizing that "we must be governed by the statute and its plain meaning," interpreted a challenged section to incorporate a prohibition on "undue preference and discrimination" from the text of a neighboring section. 234 U.S. 476, 485-86, 488 (1914). In *American Power & Light Co.*, the Court relied on a statute's specific standards for new security issues that constituted "a veritable code of rules" to inform the SEC's discretion to ban "unduly or unnecessarily complicate[d]" corporate structures. 329 U.S. at 105. I could continue with

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C.F.R. § 151.11(b)). If the majority is right about the principle guiding these decisions, it cannot be proper for BIA to deny an acquisition because of the harm to local government caused by "the removal of the land from the tax rolls," *id.*

examples, but they all illustrate the same point: even in a nondelegation challenge, a court must find meaning for an ambiguous phrase in some relevant text. Here, by contrast, the majority perceives a mood of economic development, which Congress did not articulate, and the majority justifies this mood by its own assessment of Congress's good intentions.

In short, this court, like the First, Eighth, and Tenth Circuits before it, has constructed an intelligible principle for § 5 that consists simply of knowing why Congress enacted the provision. I do not deny that Congress wanted to alleviate the problems faced by Native Americans. Nevertheless, this alleged intelligible principle is relevant only for nondelegation challenges. The fact that the Supreme Court has also acknowledged the motivation for the IRA, Maj. Op. at 13-14, does not make that motivation any more meaningful as a standard to guide the Secretary's decisions on trust acquisitions.[2] If it were meaningful, it would be contrary to the plain text of § 5, which gives the Secretary unfettered discretion over such decisions.

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[2] Amusingly, *Mescalero Apache Tribe v. Jones*, in perhaps ill-considered dicta, recited the same legislative history as the majority on its way to *limiting* the tax immunities enjoyed by Indians. 411 U.S. 145, 152-59 (1973).

B

Given the absence of standards to govern the Secretary's exercise of his § 5 authority, I conclude the authority is too broad to be valid. Unquestionably, a standardless delegation is valid if it is small; "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. While the majority recognizes that scope matters, it fails to acknowledge that under established nondelegation doctrine, a standardless delegation must be quite narrow. *Whitman* provided the canonical example of a sufficiently small delegation: EPA can "define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators." *Id.*; *see* 42 U.S.C. § 7411(i) ("Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.").

By contrast, the § 5 power is quite broad. The majority blandly characterizes it as the power to grant status as Indian country, but the majority ignores the far-reaching consequences of that status.[3]

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[3] The majority also regards the power to hold land in trust as having aspects of Executive authority, apparently akin to the foreign relations powers that mitigated a delegation in *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965). Maj. Op. at 14-15. Regardless of the Executive's role in concluding treaties with Indians, "the

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By taking land in trust for Indians, the Secretary removes it from the jurisdiction of the State in which it sits and places it under the authority of a tribe. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529-31 (1998) (noting federal land held in trust for Indians is Indian country (citing *United States v. McGowan*, 302 U.S. 535 (1938)). Thus, the trust acquisition authority is a power to determine who writes the law, and thus indirectly what the law will be, for particular plots of land.

The consequences of the Indian country designation are profound. Most obviously, Indian country and its beneficial owners are "exempt from State and local taxation." 25 U.S.C. § 465 para. 4. Indeed, tribal residents of Indian country are even exempt from motor vehicle and state income taxes. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 127-28 (1993); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 165 (1973). More generally, Indian country is subject to federal and tribal jurisdiction in both civil and criminal matters. *Native Vill. of Venetie*, 522 U.S. at 527 & n.1 (civil); *DeCoteau v. Dist. County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 428 n.2 (1975) (civil); *see United States v. John*, 437 U.S. 634, 649, 654 (1978) (reversing state conviction for a

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Constitution places the authority to dispose of public lands exclusively in Congress," and that includes the power to hold lands in trust. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *see also* U.S. CONST. art. IV, § 3 cl. 2 (Property Clause).

crime committed on trust land). A state "presumptively lacks jurisdiction to enforce" its regulations in Indian country. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996). A tribal sovereign ousts a state, unless Congress expressly provides otherwise. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).[4] These consequences result not from other statutes, as the majority claims, Maj. Op. at 15-16, but from the "attributes of sovereignty" that "Indian tribes retain." *Id.* at 207; *see also Okla. Tax Comm'n*, 508 U.S. at 128, Surely we need not avert our gaze from the constitutional backdrop against which Congress legislates.

Thus, § 5 allows the Secretary, by taking land in trust for Indians, to oust state jurisdiction in favor of government by the beneficiaries he chooses. Although there are certain limits on the scope of this power, such as the restriction that land may only be held "for Indians," they are not nearly narrow enough to validate a standardless delegation. By comparison to the EPA's authority to define country elevators, the § 5 power is astoundingly broad. While the EPA was allowed to exempt certain pollution sources,

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[4] The Gun Lake Band casino project nicely illustrates how substantially a change to Indian country status can affect both Indians and non-Indians in the vicinity of trust land. Local governments stand to lose $85,000 per year in direct property taxes, while the extra traffic and other activity connected to the casino will force local police to hire additional staff at a cost of over $400,000 per year.

circumscribed by size, from pollution regulations the EPA itself had imposed under a specific provision, 42 U.S.C. § 7411, here the Secretary can completely remove areas of land from the jurisdiction of state and local governments. Although this power may not need the "substantial guidance" the Supreme Court thought necessary for the EPA's broad authority to set air-quality standards, *Whitman,* 531 U.S. at 476, the power it confers is far too broad to survive without any guidance at all.

C

Section 5 gives the Secretary unguided authority to transfer areas of land from the jurisdiction of state and local government to that of various bands of Indians. None of the foregoing implies BIA has exercised its authority wantonly. But the question is not what it has done, but what it has authority to do. The authority was Congress's to give and the boundaries were for Congress to provide as well. Since it has failed to do so, I am forced to conclude § 5 of the IRA is an unconstitutional delegation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHIGAN GAMBLING OPPOSITION ("MichGO"), a Michigan non-profit corporation,

Plaintiff,

v.

GALE NORTON, in her official Capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.

Defendants.

MATCH-E-BE-NASH-SHE-WISH BAND OF POT-TAWATOMI INDIANS, a federally-recognized Indian Tribe,

Intervenor.

Civil Action No. 05-01181 (JGP)

(Filed Feb. 23, 2007)

OPINION

This comes before the Court on the **United States Motion to Dismiss or in the Alternative for Summary Judgment [#33]** ("Def.'s Mot."), and the **Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' Motion for Judgment on the**

Pleadings or, in the Alternative for Summary Judgment [#32] ("Intv.'s Mot.").[1]

Defendants argue, among other things, that there are no genuine issues of material fact in dispute which merit this case proceeding to trial. Def.'s Memo, at 1. For nearly identical reasons, intervenor also argues for dismissal of the Complaint. Intv.'s Mot., at 2.

Plaintiff opposes the dispositive Motions on the following grounds:[2] "First," according to plaintiff, defendants' classification of the proposed casino site as an "initial reservation" is inconsistent with the requirements imposed by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. Pl.'s Opp., at 1. "Second," plaintiff argues that defendants have violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq. by failing to issue an environmental impact statement ("EIS"), and

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[1] When citing the Statement of Points and Authorities in Support of the United States' Motion to Dismiss or in the Alternative for Summary Judgment, the Court will use the abbreviation "Def.'s Memo." The Court will use the abbreviation "Intv.'s Memo" when citing the Statement of Points and Authorities in Support of the Intervenor's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.

[2] Plaintiff opposes both dispositive Motions within the same pleading. *See generally* Michgo's Combined Statement of Points and Authorities in Opposition to Federal Defendants' and the Gun Lake Band's Motions to Dismiss or in the Alternative for Summary Judgment [#50] ("Pl.'s Opp."). Accordingly, the Court addresses both dispositive Motions within this Opinion.

instead issuing a finding of no significant impact ("FONSI"). *Id.* "Third," plaintiff argues that defendants cannot legally authorize Class III gaming because they have not yet secured a tribal-state gaming compact. *Id.* at 2. And fourth, plaintiff argues that "Defendants have no constitutionally valid authority on which to acquire land in trust for [intervenor]." *Id.*

Having considered the dispositive Motions, plaintiff's Opposition, the Replies thereto, and the entire record, the Court concludes that plaintiff has raised no genuine issues of material fact and defendants and intervenor are entitled to judgment as a matter of law. A full explanation of the Court's conclusions follows.

BACKGROUND

This dispute arises from defendants' decision to place two parcels of land ("Bradley Property")[3] into

[3] The Bradley Property, according to intervenor,

> is nearly 200,000 square feet, [and] . . . the precise footage of the existing warehouse and factory building that will be converted to the proposed gaming complex is 193,424 square feet. . . . [T]he facility includes gaming space, two casual dining restaurants, a buffet-style restaurant, two fast food outlets, some retail space, a sports bar, an entertainment lounge, office space, and parking space. . . . [T]he specific size of the gaming area is 98,879 square feet, and the actual number of parking spaces will total 3,352, including 17 spaces for buses and 26 for Recreational Vehicles.

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trust for intervenor which intervenor contends is vital to its economic development, self determination and economic sufficiency. Motion to Intervene [#7] ("Mot. to Intv."), at 2; Def.'s Memo, at 1. Intervenor expects that the Bradley Property, which is located "approximately 25 miles from Kalamazoo and approximately 30 miles from the City of Grand Rapids" in Wayland Township, Michigan, will bring a large number of jobs and income to its approximately 300 members if converted into a casino.[4] Intv.'s Answer, at ¶ 69. Moreover, intervenor expects that the Bradley Property will "attract an average of approximately 8,500 visitors per day, and that approximately 1,800 people will be employed at the facility." *Id.* at ¶ 60.

On August 23, 1999, intervenor, descendants of an Indian tribe who lived in a village near the present-day City of Kalamazoo, Michigan in the late 1700's, gained official recognition from defendants, the U.S. government.[5] 63 Fed. Reg. 56936 ("Final Determination

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Answer of Intervenor Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians [#19] ("Intv.'s Answer"), at ¶ 27 (internal quotation marks omitted); see also Complaint, at ¶ 27.

[4] Defendants assert that the "tribe resides in an area that . . . [suffers] six times the unemployment rate of the rest of the area." Oral Argument Transcript ("Tr. Oral Arg."), at 21.

[5] Collectively, defendants are the Secretary of the Interior, the Bureau of Indian Affairs ("BIA"), and the National Indian Gaming Commission ("NIGC"). The BIA is an administrative agency which falls under the authority of the Secretary of the Interior. *Lincoln v. Vigil*, 508 U.S. 182, 185, 113 Sect. 2024 (1993). The NIGC, an agency "charged with the development of regulations and administrative enforcement of IGRA[,]" *United*

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to Acknowledge the Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan"). Intervenor submitted an application to defendants for a proposed casino on August 7, 2001, seeking to have defendants take into trust the 147-acre Bradley Property. Complaint, at ¶ 6; Pl.'s Opp., at 2. Defendants prepared and issued a FONSI on February 27, 2004, based on an Environmental Assessment ("EA") that defendants published in December 2003. Intv.'s Answer, at ¶¶ 3, 52; Complaint, at ¶ 3. Publication of the EA was preceded by a seventy-five day public comment period. Intv.'s Memo, at 6. Defendants then issued a notice of their intent to take the Bradley Property into trust on May 13, 2005. Pl.'s Opp., at 4.

On June 13, 2005, plaintiff, a Michigan non-profit corporation that opposes the proliferation of gambling venues, filed the Complaint alleging that defendants have violated IGRA, NEPA and the Constitution's non-delegation doctrine. Complaint, at

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States v. Seminole Nation of Okla., 321 F.3d 939, 941 (10th Cir. 2002) (citing 25 U.S.C. §§ 2705, 2706), was also instrumental in helping shape many of the administrative findings in this case. *E.g.*, Intv.'s Answer, at ¶ 27 ("The Tribe admits that the NIGC has concluded that gaming will be permitted on the land once it is taken into trust as the Tribe's initial reservation under IGRA."). Under the law, federal recognition means that a "tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally-recognized historic tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.12(a).

¶¶ 1, 4, 12. The Court heard oral argument on the dispositive Motions on November 29, 2006.

STANDARD OF REVIEW

I. Motion to Dismiss

Dismissal is appropriate when considering a motion to dismiss only when the moving party has established that the non-moving party can prove no facts in support of its claims which entitles it to relief. *Bell v. Exec. Comm. of the United Food & Commer. Workers Pension Plan for Emples.*, 191 F. Supp. 2d 10, 15 (D.D.C. 2002) (citing *In re Swine Flu Immunization Products Liability Litigation*, 279 U.S. App. D.C. 366, 880 F.2d 1439, 1442 (D.C. Cir. 1989)) (in turn citing Fed. R. Civ. P. 12(b)(6)). Generally, a complaint need only contain "a short and plain statement that [provides] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346, 125 S. Ct. 1627 (2005) (citation omitted). "[T]he allegations of the complaint should be construed favorably to the pleader." *Aerovias de Mex., S.A. de C.V. v. Nat'l Mediation Bd.*, 211 F. Supp. 2d 1 (D.D.C. 2002). That is, a plaintiff's allegations of fact must be accepted by the Court as true and all reasonable inferences should be construed in the plaintiff's favor. *Marshall County Health Care Auth. v. Shalala*, 300 U.S. App. D.C. 263, 988 F.2d 1221, 1225 (D.C. Cir. 1993). "If the court considers matters outside the pleadings before it in a 12(b)(6) motion, the above

procedure will automatically be converted into a Rule 56 summary judgment procedure." *Mortensen v. First Federal Sav. & Loan Asso.*, 549 F.2d 884, 891 (3d Cir. 1977) (citing 5 C. Wright and A. Miller, Federal Practice and Procedure § 1350 (1969)). A court "will not accept unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegation" when addressing a motion to dismiss for failure to state a claim. *Kelley v. Edison Twp.*, 2006 U.S. Dist. LEXIS 23510, at *15 (D.N.J. April 25, 2006) (citation omitted).

II. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is virtually identical to a motion to dismiss for failure to state a claim. *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006) (citation omitted). Under this legal standard as well, "the court must accept as true the complaint's factual allegations and draw all inferences in the plaintiff's favor." *Id.* (quoting *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) (other citations and internal quotation marks omitted)). "A complaint should not be dismissed on the pleadings unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citations omitted).

III. Motion for Summary Judgment

A court should grant a motion for summary judgment only when it determines that "reasonable jurors could [not] find by a preponderance of the evidence that the plaintiff is entitled to a verdict[.]" *Griffin v. Acacia Life Ins. Co.*, 151 F. Supp. 2d 78, 79-80 (D.D.C. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986)). A court should dismiss the case under this standard "when evidence on file shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citations and internal quotation marks omitted).

> [A] genuine dispute about material facts exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.
>
> While a nonmovant is not required to produce evidence in a form that would be admissible at trial, *the evidence still must be capable of being converted into admissible evidence.* Otherwise, the objective of summary judgment – to prevent unnecessary trials – would be undermined.

Id. at 80 (internal citations, alterations and quotation marks omitted) (emphasis added). As with the preceding motions, "[w]hen ruling on a motion for summary judgment, [ ] Court[s] must view the evidence in the light most favorable to the non-moving party." *Worth*

v. Jackson, 377 F. Supp. 2d 177, 180-81 (D.D.C. 2005) (citing *Bayer v. United States Dep't of Treasury,* 294 U.S. App. D.C. 44, 956 F.2d 330, 333 (D.C. Cir. 1992)). Notwithstanding, "the non-moving party cannot rely on mere allegations or denials . . . , but . . . must set forth specific facts showing that there [are] genuine issues for trial." *Id.* (citation and internal quotation marks omitted) (alterations in original).

ANALYSIS

I. Classification of the Bradley Property as "Initial Reservation"

The Court first addresses plaintiff's claim that defendants' classification of the Bradley Property as an "initial reservation" violates the statutory limitations imposed by IGRA on Indian tribes engaged in gaming activities. Complaint, at ¶ 6. Defendants and intervenor argue that plaintiff has misread IGRA. Intv.'s Memo, at 45; Def.'s Memo, at 40.

"Congress' central purpose in enacting IGRA was to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Chickasaw Nation v. United States,* 534 U.S. 84, 99, 122 S. Ct. 528 (2001) (citation and internal quotation marks omitted). Under the judicial review section of the statute, final administrative decisions are to be appealed to federal district courts pursuant to the Administrative Procedure Act. *United States ex rel. St. Regis Mohawk Tribe*

v. President R.C.-St. Regis Mgmt. Co., 451 F.3d 44, 48 (2d Cir. 2006). Section 20 of IGRA states that "gaming is not permitted on Indian land taken into trust by the Secretary after IGRA's effective date, October 17, 1988, unless[,]" *inter alia*, the "land [is] taken into trust as part of . . . the *initial reservation* of an Indian tribe acknowledged by the Secretary[.]"[6] *City of Roseville v. Norton*, 358 U.S. App. D.C. 282, 348 F.3d 1020, 1024 (D.C. Cir. 2003) (citing 25 U.S.C. § 2719(b)(1)(B)(ii) (internal quotation marks omitted) (emphasis added)).

Here, plaintiff reads the term "reservation" as provided within § 20 of IGRA to "refer[ ] to land set aside under federal protection **for the residence** of tribal Indians, regardless of origin.'" Pl.'s Opp., at 10 (quoting Felix S. Cohen, *Federal Indian Law* 34 (1982 ed.) (emphasis in original)). Plaintiff argues that this is the only logical interpretation since the term "reservation" is not defined in IGRA. *Id.* at 9. Principally, plaintiff relies on *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001) in

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[6] Plaintiff asserts that a *two-step process* must be undertaken before intervenor can engage in gaming on the Bradley Property. Pl.'s Opp., at 10 ("Where none of these exceptions is available, gambling is permitted on offreservation sites **only** by way of a two-step approval process in which DOI and the State's governor concur that the casino 'would not be detrimental to the surrounding community.'" (quoting 25 U.S.C. § 2719(b)(1)(A) (emphasis in original)). Notwithstanding, because the Court concludes that the Bradley Property meets the "initial reservation" exception under § 20 of IGRA, the two-step process is not triggered in this case. *See* 25 U.S.C. § 2719(b)(1)(B)(ii).

support of its position, which concluded that (1) the Secretary of the Interior lacked authority to interpret the term "reservation," and therefore (2) the court owed "no deference" – typically referred to as *Chevron* deference – to the Secretary's interpretation. 240 F.3d 1250, 1265 (10th Cir. 2001) (referencing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984)). The *Sac and Fox* court then concluded that the interpretation that a "reservation" must include housing to be legally defined as such was "the one *Congress intended* to adopt when it enacted IGRA." *Id.* at 1267 n.19 (emphasis added).

Were this Court to instead accept defendants' position that land may qualify as a "reservation" without including housing, plaintiff argues that the Bradley Property cannot be intervenor's "initial" reservation because intervenor had at least one federally recognized reservation in the past. Pl.'s Opp., at 2526 (citing AR 1986; AR 2033).[7]

A. Whether Land Used for Gaming must Also Be Used for Housing

It is indeed settled law that Congress did not define the term "reservation" within IGRA. *Arizona Pub. Serv. Co. v. EPA*, 341 U.S. App. D.C. 222, 211 F.3d 1280, 1293 (D.C. Cir. 2000). Despite this fact, "almost immediately" following the ruling in *Sac and*

[7] The abbreviation "AR" is used when citing to the administrative record.

Fox, "Congress *rebuked the decision* . . . , enacting legislation stating that the authority to determine whether land is a 'reservation' was *delegated to the Secretary* as of the effective date of IGRA." *City of Roseville*, 348 F.3d at 1029 (citing Pub. L. No. 107-63, § 134 (2001) (emphasis added)).[8] Pursuant to the holding in *City of Roseville*, and in light of § 134, which Congress *did not limit* to the "restored lands" exception within § 20 of IGRA, the Secretary's interpretation of the term "reservation" is owed *Chevron* deference.

The court in *Citizens Exposing Truth About Casinos v. Norton*, 2004 U.S. Dist. LEXIS 27498 (D.D.C. April 23, 2004) ("*CETAC*") reached a similar conclusion, explaining that

> there appears to be no statutory or regulatory requirement that land must contain housing in order for the Secretary to proclaim it a reservation under the IRA and for it to qualify as an initial reservation under IGRA. When taking property into trust, the Secretary acts pursuant to the IRA, not . . . the IGRA, and regulations promulgated under the IRA define a reservation as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f).

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[8] The holding in *City of Roseville* addresses the "restored lands" exception within § 20. Here, the Court addresses the "initial reservation" exception.

> It is altogether reasonable, therefore, for the Secretary to adopt the definition of reservation contained in the regulations promulgated pursuant to the statute under which she acts. *The Court concludes that the Secretary has authority to interpret the phrase "initial reservation" as she has done.*

2004 U.S. Dist. LEXIS 27498, at *15 (D.D.C. April 23, 2004) (internal citation omitted) (emphasis added).[9] As in *CETAC*, this Court concludes that because there has been a congressional delegation of authority to the administrative agency to interpret § 20 of IGRA, and defendants' interpretation of the term "reservation" is not demonstrably arbitrary, capricious, or contrary to the statute[10], the Court "must

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[9] The purpose of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 et seq. is "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267 (1973) (quoting H.R.Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)).

[10] The arbitrary and capricious standard has been defined this way:

> An agency's rule would be arbitrary and capricious if the agency relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. [ ] Although our inquiry into the facts is to be searching and careful, *this court is not empowered to substitute its judgment for that of the agency.*[ ]

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accept" the agency's interpretation that the term "reservation" does not include a housing requirement. *See Sac and Fox,* 240 F.3d at 1261. Also, the Indian Canon of statutory construction supports the Court's conclusion, pursuant to which "[t]he Supreme Court has on numerous occasions noted that *ambiguities in federal statutes are to be read liberally in favor of the Indians. . . .*" *City of Roseville,* 348 F.3d at 1032 (citing *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 269, 112 S. Ct. 683 (1992) (other citation omitted) (emphasis added)).[11] Plaintiff's argument therefore fails.

B. Whether the Bradley Property Is an "Initial Reservation"

Plaintiff alternatively argues that the Bradley Property is not an "initial" reservation because intervenor had at least one reservation in the past. Pl.'s Opp., at 2526. Plaintiff further expounded upon its position at oral argument:

Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 287-88 (4th Cir. 1999) (internal citations omitted) (emphasis added).

[11] *Cf. Arizona Pub. Serv. Co.,* 211 F.3d at 1293 ("[T]he term 'reservation' has no rigid meaning as suggested by petitioners. . . . The [ ] varying definitions of 'reservation' lay to waste petitioners' argument. . . . [G]iven the varying definitions of the term . . . , it would be a curious result indeed for this court to insist that the absence of a definition requires [the agency] to advance the most restrictive definition as put forth by petitioners.").

> [T]he problem for the government and the tribe here is that it is undisputed that the tribe has previously had at least one federal reservation near the Kalamazoo area. They had a three-mile reserve and they may have had more. They've contended that they've had more than one but they've at least had one.
>
> And so this is admitted in the tribe's application in several places. [Plaintiff directs] the court to AR 1986 and AR 2033.

Tr. Oral Arg., at 46.

In contrast, defendants state:

> [T]he two [ ] reservations that Plaintiff refers to are actually the same 3-mile parcel in Kalamazoo, Michigan. . . . [which] Plaintiff also fails to point out . . . was ceded by the Potawatomi to the United States in the Treaty of 1827.

Def.'s Reply, at 18 (citing AR 1986, 2033). Defendants insist that the 3-mile parcel in question certainly does not constitute intervenor's "initial" reservation because the definition of "Indian lands" as provided within IGRA and the IRA "includes only those lands which *the United States recognizes* as the tribe exercising its governmental jurisdiction." Def.'s Memo, at 46 (emphasis added). In defendants' view, because intervenor "currently does not exercise governmental jurisdiction over any land," it "currently does not possess land that meets the definition of reservation under IGRA or the IRA." *Id.* at 47.

To meet the "initial reservation" exception as a matter of law, a tribe must be recognized by the U.S. Government. *See* 25 U.S.C. § 2719(b)(1)(B)(ii); *see also* 25 C.F.R. § 83.10 (explaining the process by which an American Indian group becomes an officially recognized Indian tribe). The history in this case regarding the 3-mile parcel's transfer to the government back in 1827 is murky. It is unclear if the parties themselves are even fully aware of the circumstances surrounding the land transfer. Whatever the case, the land is not intervenor's "initial reservation" because intervenor only gained official governmental recognition on August 23, 1999, 63 Fed. Reg. 56936, and has thus never exercised jurisdiction over any land. Accordingly, defendants' classification of the Bradley Property as intervenor's "initial reservation" does not violate the law.

On this issue, then, there is no genuine issue of material fact in dispute.

II. Issuance of FONSI Instead of an EIS

Next, the Court considers plaintiff's argument that defendants' decision to issue a FONSI and not an EIS violates NEPA. Pl.'s Opp., at 1. Defendants and intervenor counter that this decision, under the broad discretion generally afforded administrative agencies, is legally sound. Def.'s Memo, at 2438; Intv.'s Memo, at 16-38.

Fundamentally, "NEPA 'imposes only procedural requirements on federal agencies with a particular

focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.'" *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, ___ U.S. ___, 126 S. Ct. 1843, 1852 (2006) (citation omitted). The Act "simply guarantees a particular procedure, *not a particular result.*" *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 737, 118 S. Ct. 1665 (1998) (emphasis added). NEPA requires agencies "to consider the cumulative environmental impacts of any proposed action." *Town of Cave Creek v. FAA,* 355 U.S. App. D.C. 420, 325 F.3d 320, 328 (D.C.Cir. 2003) (citation and internal quotation marks omitted). Nevertheless, NEPA-related agency decisions are afforded a considerable degree of deference, and "[a]n agency's decision not to prepare an EIS can be set aside only upon a showing that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Department of Transportation v. Public Citizen,* 541 U.S. 752, 763, 124 S. Ct. 2204 (2004) (citation and internal quotation marks omitted).

Plaintiff makes two arguments which appear to compete with one another in support of its position. First, plaintiff argues that "the *length and complexity*" of the EA "militates in favor of preparing an EIS" because "CEQ advises that an EA should be no more than 10-15 pages in length"[12] and the EA contains

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[12] The Council of Environmental Quality ("CEQ"), "established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in

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"*208 pages of text* plus almost *1,000 pages of attachments.*" Pl.'s Opp., at 32 (emphasis added). Plaintiff then appears to argue that the EA lacks sufficient complexity, stating that it "is *inadequate* in its treatment of the casino's expected impact on the surrounding rural area [,]"[13] *"fail[s] to address* a number of significant impacts from increased traffic generated by the casino[,]" *"gives short shrift* to the expected impact of the proposed casino on the broader West Michigan community [,]" and is *"deficien[t]* . . . in its treatment of indirect impacts." *Id.* at 35, 39, 43, 45 (emphasis added).

A. Length and Complexity of EA

With regard to plaintiff's length and complexity argument, it was roundly rejected by the D.C. Circuit in *TOMAC v. Norton,* 369 U.S. App. D.C. 85, 433 F.3d 852 (D.C. Cir. 2006), a recent case where, like here, a

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determining what actions are subject to that statutory requirement." *Public Citizen,* 541 U.S. at 757 (citing 40 C.F.R. § 1500.3).

[13] Plaintiff asserts that the area which surrounds the Bradley Property is rural. To this assertion, intervenor states that the Bradley Property is currently zoned "light industrial." Intv.'s Memo, at 1 (discussing how intervenor "proposes to create its casino by redeveloping existing (but currently vacant) factory and warehouse buildings, on a site lying between a highway and a railroad line that is already zoned for, and surrounded by, light industrial and commercial uses."). Plaintiff has constructively "admitted" this characterization of the areas surrounding the Bradley Property by not disputing it in filings or during oral argument. LCvR 7(h).

Michigan non-profit corporation challenged an agency decision to take land into trust on behalf of an Indian tribe. In that case, the parties "anticipated arrival of 4.5 million visitors a year to a rural community of less than 5,000 residents[,]" while the EA took "four-and-a-half years" to complete and was "almost 900 pages [.]" 369 U.S. App. D.C. 85, 433 F.3d 852, 862 (D.C.Cir. 2006). Here, in comparison, the Bradley Property is anticipated to attract substantially *less visitors annually, see* Intv.'s Answer, at ¶ 60, to a *slightly smaller* area currently zoned "light industrial." Intv.'s Memo, at 1. Moreover, the instant EA appears to have taken *much less time to complete* and is only *slightly longer in page length*, when including attachments, than the EA in *TOMAC*. *See* Intv.'s Memo, at 6, 32.

Still, when faced with an identical argument to the length and complexity argument that plaintiff makes here, the *TOMAC* court held that "the length of an EA has no bearing on the necessity of an EIS." *TOMAC*, 433 F.3d at 862 (citation omitted). Additionally, the court held that EA complexity and controversy "do not by themselves show that the EAs' conclusion – 'no significant impact' – is . . . incorrect.'" *Id.* (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985)). And regarding plaintiff's reliance "on the CEQ guidelines, which advise that an EA should be no more than 10-15 pages in length[,]" the court held that "[t]his guideline is *not a binding regulation*[.]" *Id.* (emphasis added). Contrary to plaintiff's position, "'[w]hat ultimately determines whether an

EIS rather than an EA is required is the scope of the project itself, not the length of the agency's report.'" *Id.* (quoting *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 434 (8th Cir. 2004)).

Pursuant to the *TOMAC* holding, then, plaintiff's length and complexity argument fails.[14]

B. Substantive Challenges to EA

Plaintiff also challenges the EA on substantive grounds, arguing that it "glosses over" the Bradley Property's potential impacts on traffic, and its surrounding and broader West Michigan communities.

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[14] The *TOMAC* ruling also undercuts plaintiff's argument, made a few months after oral argument on the dispositive Motions, that an internal Interior Department document entitled "Checklist for Gaming Acquisitions, Gaming Related Acquisitions and IGRA Section 20 Determinations" mandates that an EIS be prepared in this case. *See generally* Michgo's Post-Hearing Statement of Points and Authorities in Opposition to Federal Defendants' and the Gun Lake Band's Motions to Dismiss or in the Alternative for Summary Judgment [#68] ("Pl.'s Post-Hearing Opp."). The critical language that plaintiff points to is as follows:

> **Proposals for large, and/or potentially controversial gaming establishments should require the preparation of an EIS, especially if mitigation measures are required to reduce significant impacts.**

Pl.'s Post-Hearing Opp., at 1-2 (emphasis in original). Notwithstanding, if the CEQ guidelines do not bind the agency to produce an EIS, *TOMAC*, 433 F.3d at 862, certainly the agency is not bound to produce one by its own internal checklists.

Pl.'s Opp., at 35-43. Plaintiff further argues that the EA fails to adequately address indirect effects. *Id.* at 43. In responding, intervenor described the threshold question this way during oral argument: "It is not a question of whether you or I or MichGO would have made a different decision. The question is did [the EA] actually . . . consider the environmental consequences." Tr. Oral Arg., at 21.

Courts apply a four-part test when determining if a FONSI was properly issued: (1) whether the agency has "accurately identified the relevant environmental concern[;]" (2) whether the agency has "taken a *hard look* at the problem in preparing the EA[;]" (3) whether the agency has made "a convincing case for its finding" within the FONSI; and (4) "if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum." *Grand Canyon Trust v. FAA,* 351 U.S. App. D.C. 253, 290 F.3d 339, 340-41 (D.C. Cir. 2002) (citations and internal quotation marks omitted). Further, the Court reiterates the long-standing rule that an administrative agency's decision to issue a FONSI instead of an EIS may only be overturned "if it was arbitrary, capricious or an abuse of discretion." *Sierra Club v. United States Dep't of Transportation,* 243 U.S. App. D.C. 302, 753 F.2d 120, 126 (D.C. Cir. 1985).

Here, defendants analyzed the full range of potential environmental impacts of taking the Bradley Property into trust, took a "hard look" at the

associated problems in preparing the EA, and offered substantial mitigation measures where they found truly significant impacts. *Grand Canyon Trust,* 290 F.3d at 340-41. Thus, the Court will leave the administrative finding undisturbed.

Below, the Court more closely examines the potential environmental impacts of the Bradley Property, as well as plaintiff's specific challenges.

i. Surrounding and Broader West Michigan Communities

Plaintiff makes this argument regarding the proposed casino site's direct impact on its surrounding and broader Western Michigan communities: "The farmland that makes up the area is a defining feature of the community. *Those who live in the area, including MichGO's members, did not move to the country so they could be down the road from a massive casino.*" Pl.'s Opp., at 35 (emphasis added). Plaintiff also raises the issue of the federal ozone standard as a ground upon which the Court should order that an EIS be prepared, arguing that defendants failed to predict that Southwestern Michigan, which includes the Bradley Property, would become a non-attainment area for ozone under the Clean Air Act. *Id.* at 33. Further, plaintiff argues that compulsive gambling and crime will result if the Court allows the administrative finding to stand. *Id.* at 36-37. Defendants and intervenor counter that the EA rigorously examines the potential impacts on farmland and

historic properties, the problem of atmospheric pollution and other such pollutants considered harmful to public health and the environment, as well as cultural resources and socioeconomic conditions. Def.'s Memo, at 13; Intv.'s Memo, at 16-40. Having carefully weighed the arguments of the parties, the Court concludes that plaintiff's argument lacks merit.

With regard to farmland and historic properties, defendants assert that the Bradley Property fully complies with the Farmland Protection Policy Act and the National Historic Preservation Act, and is thus not expected to impact federally designated farmland or historic properties. Def.'s Memo, at 29. This assertion finds ample support within the record. AR 125-26 (Prime and Unique farmland); AR 93-94 (historic properties); *see also* Intv.'s Reply, at 23 ("[W]hile it is true the facility will affect 21 acres of 'locally important' farmland . . . , this amounts to .011 percent of County farmland bearing that designation – a percentage . . . reasonably deemed 'relatively small.'" (quoting AR 126)); Intv.'s Memo, at 6 ("[N]o significant historical resources will be affected."). Moreover, plaintiff's argument that those who have brought this action and others "did not move to the country so they could be down the road from a massive casino[,]" Pl.'s Opp., at 35, simply does not establish that defendants acted arbitrarily, capriciously or abused their discretion in reaching the preceding conclusion.

On the issue of pollution, plaintiff argues that the Bradley Property is located within an ozone non-attainment area. Pl.'s Opp., at 33. Intervenor responded

during oral argument that the area has not yet been so designated. Tr. Oral Arg., at 24 ("[A]fter the EPA changed the means of monitoring ozone, Congress passed a specific law that *for a period of time that includes the present* has declared that this area is an ozone attainment area. *So it has not yet even become a non-attainment area.*" (emphasis added)). However, in anticipation of the area eventually being designated a non-attainment zone by the federal government, defendants conducted an additional study which lead them to the following conclusion:

> whether this is an attainment or non-attainment zone, this project will have no significant environmental effects with respect to ozone in particular, air-quality in general because *the level of emissions from this project will fall below the federal threshold of 100 tons per year of significance*[.]

Tr. Oral Arg., at 25 (emphasis added).[15]

This conclusion makes a convincing case for the administrative finding because it *details* how the Bradley Property will avoid significantly impacting current air-quality levels, and will likewise avoid significantly impacting air-quality levels in the event that "future regulations" are put into place. *Id.* Defendants also note that the Bradley Property fully complies with the Clean Air Act and the National

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[15] *But see TOMAC*, 433 F.3d at 863-64 ("BIA [i]s under no obligation to hypothesize about future regulations.").

Ambient Air Quality Standards. Def.'s Memo, at 39. Moreover, defendants insist that any potential impacts to water quality posed by the Bradley Property will be mitigated. *Id.* The immediately preceding assertions also find record support. *See* AR190, 1239-46; *see also* AR185-91 (discussing EPA requirement that a Storm Water Pollution Prevention Plan be prepared to limit soil erosion and address any impacts to water quality brought on by the proposed casino).

And with regard to the issues of cultural resources and socioeconomic conditions, plaintiff argues that the Bradley Property, if converted into a casino, will trigger a marked increase in compulsive gambling and crime, yet "the EA devotes *not a single word* to discussing the implications" of these increases. Pl.'s Opp., at 36-37 (citations omitted); *but see id.* at 33 (admitting that the EA examined the effects of compulsive gambling and crime, concluding "that they are not expected to be significant[.]" (emphasis added)). Defendants and intervenor contend, however, that the EA provides exhaustive analysis in these areas. *See* Intv.'s Memo, at 31-33; *see also* Def.'s Memo, at 30. As set forth below, the Court concludes that the facts simply do not bear plaintiff's argument out.

Defendants, to be sure, found no convincing evidence demonstrating that compulsive gambling and crime increase with the introduction of a casino into a community. AR 134-35. Plaintiff has failed to identify the defect in this conclusion, and has likewise

failed to identify any flaws in the *process* undertaken in reaching this conclusion. *See Ohio Forestry,* 523 U.S. at 737 (procedural requirements under NEPA). Rather, plaintiff asserts with no authority that casinos cause "*well[-]known* impacts of compulsive gambling on individuals and families, including increased rates of alcoholism, drug abuse, divorce, crime, and bankruptcy." Pl.'s Opp., at 37 (emphasis added). Further, the Court notes that intervenor is signatory to a legally-binding agreement which is specifically designed to combat resultant crime and gambling, having

> waived its sovereign immunity with the local police department to pay for four additional deputies to the tune of [approximately] $400,000 a year in order to be available to respond to any crime consequences that occur in the casino or as a result.
>
> . . . .
>
> [Further,] the tribe has undertaken to engage in training efforts and other community-based efforts to deal with any tendency to compulsive gambling. . . .

Tr. Oral Arg., at 31-32; *accord* Def.'s Reply, at 31 n.13 ("[W]hile respected studies show no correlation between casinos and the string of societal ills MichGO lists, the Tribe nonetheless committed to undertake significant, particularized mitigation to alleviate local concerns."). Again, plaintiff has failed to show how the foregoing mitigation measures do not comply with the procedural requirements imposed under NEPA.

For these reasons, the Court does not deem the finding of no significant impact relating to the proposed casino site's impact on its surrounding and broader Western Michigan communities to be arbitrary, capricious, or an abuse of discretion.

ii. Indirect Effects

Plaintiff also takes issue with the EA's findings regarding indirect effects, which "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8. Specifically, plaintiff argues that the EA is deficient in its analysis of "induced growth as it relates to traffic from the casino[,]" in addition to "land use patterns, population density and growth, and effects on air, water, and other natural resources. . . ." Pl.'s Opp., at 46. Plaintiff further challenges the EA on the ground that "indirect growth induced by the casino would result in the destruction of 13 acres of wetlands and 23 acres of federally recognized 'prime farmlands.'" Pl.'s Opp., at 36 (citing AR 167, 179). Further, plaintiff argues that the EA continually "attempts to downplay the potential for significant indirect impacts from the casino by pointing to the alleged ability of local planning and zoning to control the impacts once the casino is in place." *Id.*

Defendants and intervenor argue that the EA fully complies with the requirements imposed under NEPA regarding indirect effects. *See* Def.'s Memo, at 30, 36-37; Intv.'s Memo, at 35-37; *see also* Tr. Oral

Arg., at 29 ("[The EA] contains 37 pages of discussion of the possible indirect effects . . . and concludes as to each one that there will be no environmentally significant consequences particularly taking into account the mitigation measures that the tribe has undertaken to conduct."). The Court concludes that defendants' and intervenor's arguments prevail for the reasons that follow.

As is required by law, the EA thoroughly considered the Bradley Property's foreseeable impacts on growth, residential and commercial development, land and water resources, wetlands, wildlife, socio-economic and cultural issues, traffic and pollution. *See* AR 146-183. Defendants justify their finding of no significant impact regarding indirect effects by stating that the Bradley Property will not significantly impact wetlands[16], *see* AR 166-67, emissions, *see* AR

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[16] Defendants have presented preventative mitigation measures to curb impacts to wetlands, although they maintain that wetlands will not be impacted.

> Such mitigation included, in part, (1) the use of a sediment erosion control plan, "enforceable under a NPDES permit issued by the EPA"; (2) the sitting of all construction staging areas away from all waterways and wetlands; and (3) the construction of a 120-foot long retaining wall on the parking lot to prevent disturbance of the nearby wetland area.

Intv.'s Memo, at 20 (citing AR 187-88, 1125-26, 1136). "NPDES" is an acronym for the National Pollutant Discharge Elimination System. The Michigan Department of Environmental Quality manages the NPDES permit program within the State of

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1241-42, land resources, *see* AR 135, 164-65, water resources, *see* AR 135-36, 165-66, biological resources, *see* AR 136, 166-68. historic properties and religious freedom, *see* AR 137, 168-69, socioeconomic conditions/ environmental justice, *see* AR 137, 169-77, and resource use patterns, *see* AR 137-45, AR 177-83. Def.'s Memo, at 28-30, 33, 35-37. Defendants' findings which relate to foreseeable indirect effects are, as shown, supported by the record. *See also* AR 147-56 (housing growth of core area and outer core area). Plaintiff has failed to support its argument that "[d]efendants' EA is [ ] deficient in this case" with respect to the treatment of indirect effects, Pl.'s Opp., at 45, as plaintiff has not demonstrated how defendants' findings do not comport with the NEPA requirements.

And despite plaintiff's objection to the EA's discussion of local planning and zoning in addressing indirect effects, it has provided no *controlling authority* which explains why this administrative approach somehow violates the procedural requirements imposed under NEPA. Besides, defendants argue that the EA does not rely on local planning and zoning in addressing indirect effects, but merely "assume[s] that all reasonably foreseeable indirect development *will be in compliance with local planning and zoning laws*." Def.'s Memo, at 36-37. A close reading of the

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Michigan. *United States v. Kuhn*, 345 F.3d 431, 432-33 (6th Cir. 2003).

record reveals that defendants' interpretation in this respect is the correct one. *See* AR 135-37, 145-46. Indeed, plaintiff seems to concede the point by stating in relevant part:

> The EA admits that "reasonably foreseeable indirect development. . . . is anticipated to occur" but that the impacts will be minimized because any such development will take place "*in compliance with local planning and zoning ordinances and other mandates.*" [ ] The EA states that no impacts to area land resources are expected because "proper design for site conditions will avoid potential impacts. . . ." [ ] The EA [concludes that there will not be] any significant impact to agriculture and prime farmlands because "*any future development would need to conform to local government plans for development. . . .*" [ ] And the EA states that no significant socioeconomic impacts are expected because "*any additional development within the project vicinity would be required to conform to existing township zoning. . . .*"

Pl.'s Opp., at 39 at 46-47 (citation omitted) (emphasis added).

Fundamentally, plaintiff appears to object more to the conclusion reached regarding indirect effects than to the process undertaken within the EA. However, as established above, NEPA "simply guarantees a particular *procedure,* not a particular result." *Ohio Forestry Ass'n,* 523 U.S. at 737 (emphasis added). Therefore, plaintiff has failed to demonstrate that the

administrative findings regarding indirect effects are arbitrary, capricious, or an abuse of discretion.

iii. Traffic

Plaintiff's objection to the Bradley Property's potential impact on traffic – and particularly the impact to northbound and southbound intersections – is perhaps its strongest argument. Regarding traffic volume, plaintiff argues that the EA erroneously compares the Bradley Property and the Turtle Creek casino, which is also in Michigan, because intervenor's

> casino would be **three times larger** than Turtle Creek, closer to larger population centers than Turtle Creek, visibly located next to a highway with nearly **twice** the daily traffic of Turtle Creek, and located in southwest Michigan, which has fewer casinos than the area where Turtle Creek is located.

Pl.'s Opp., at 39 (emphasis in original). In addition, plaintiff argues that defendants' own data shows that northbound and southbound intersections which surround the Bradley Property "*will operate at unacceptable levels of congestion* once the casino is in operation, yet they still conclude that this is not potentially significant for purposes of NEPA." *Id.* (emphasis added). And with respect to the role of state and local agencies in the final administrative finding, plaintiff makes this argument:

[The Michigan Department of Transportation ("MDOT")] was not aware of the significant traffic problems identified by Defendants in their study. Moreover, the . . . MDOT d[id] not mention anything about the proposed "all-way stop control" at the US-131 southbound ramps recommended by the EA, or offer any opinion as to whether it would solve the problem. Thus, although the EA concedes there will be a significant impact to southbound traffic as a result of the casino, it incorrectly suggests that MDOT has approved of the proposed mitigation.

. . . .

The EA suggests that the Allegan County Board of Road Commissioners agrees with Defendants' conclusion of no significant impact to the Village of Hopkins. (AR000116). But this is disingenuous. The letter from the Board of Road Commissioners is dated **March 13, 2003,** which is three months before Defendants completed their traffic study on the Village of Hopkins on June 6, 2003, (see AR000590). This means, at the time it wrote its letter, the Board **could not have known** about the significant impacts that would be identified in the traffic study three months later. Thus, Defendants' suggestion that the Board agrees with its conclusion of no significant impact on the Village of Hopkins is patently false. Defendants' own traffic study shows that impacts at the key intersection in the Village of Hopkins will be significant, and the EA contains **no mitigation**

> measures to reduce those impacts below the level of significance. (AR000189-90). Therefore, as with other parts of the traffic study discussed above, Defendants cannot maintain that the EA's conclusion of no significant impacts is reasonable.

Id. at 41, 42-43 (citations omitted) (emphasis in original).[17]

Defendants counter that the EA took a "hard look" at each specific problem associated with traffic, and that significant impacts will be reduced to a minimum with the implementation of *enforceable* mitigation measures. Def.'s Memo, at 39 (citing AR 221-22, 239). For the following reasons, the Court is convinced that defendants' finding of no significant traffic impact does not violate NEPA.

The Court first considers plaintiff's objection to the EA's comparison of the Bradley Property with the Turtle Creek casino. It bears repeating that when analyzing NEPA-related decisions, a court must be "deferential to the administrative agency[.]" *Williams v. Dombeck,* 151 F. Supp. 2d 9, 18 (D.D.C. 2001) (citing *Environmental Defense Fund, Inc., v. Costle,* 211 U.S. App. D.C. 313, 657 F.2d 275, 282 (D.C. Cir. 1981)). This means that a court "presumes the agency action to be valid" unless convinced otherwise. *Id.*

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[17] "LOS" is an acronym for levels of service. *Id.* at 40. "An 'A' is the highest LOS rating available, followed by B, C, D, E, and F." *Id.* at n.17.

(citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419, 91 S. Ct. 814 (1971)).

Here, the EA purportedly makes a comparison between the Bradley Property and the Turtle Creek casino because of Turtle Creek's "similarity to the [ ] proposed casino. . . ." Intv.'s Memo, at 24. The EA considers the Bradley Property and Turtle Creek to be similar, despite their differences in size, because Turtle Creek also "abuts a state highway, [ ] is situated in a similar setting with tourism in the area, and its casino features two restaurants." *Id.* (citing AR 109). The EA certainly reflects an awareness of the size disparity between the Bradley Property and Turtle Creek. AR 109 (noting that the Bradley Property "*is about three times larger than the Turtle Creek casino. . . .*" (emphasis added). However, factors such as the accessability to highways and restaurants, and the anticipated affect on tourism proved far more relevant when determining if the Bradley Property would pose a significant impact on traffic. *See id.* Plaintiff has not adequately identified the defect in this methodology, especially in light of the considerable deference owed NEPA-related agency decisions. Moreover, "this court is not empowered to substitute its judgment for that of the agency." *Hughes River Watershed Conservancy,* 165 F.3d at 288; *see also County of San Diego v. Babbitt,* 847 F. Supp. 768, 775 (D. Cal. 1994) (holding that even "disagreement between experts does not invalidate an EIS." (citing *Havasupai Tribe v. Robertson,* 943 F.2d 32, 34 (9th Cir. 1991)).

The issue of northbound and southbound traffic congestion, however, gives the Court pause because intervenor appears to have contradicted itself. Initially, intervenor seemed to concede in its papers that traffic at northbound and southbound intersections close to the Bradley Property presents a significant problem, explaining that the EA offers responsive mitigation measures and how the traffic engineering firm that it retained, URS Corporation, helped to reach this conclusion. Specifically, intervenor stated:

> The study did find that the infusion of casino traffic could affect the flow of afternoon rush hour traffic in *two directions*. . . .
>
> [These directions are] *southbound* at the US-131/129th Avenue ramp and *northbound* at the US-131 Avenue ramp *intersections* near the project site[.]
>
> . . . .
>
> URS identified road improvements that would either eliminate the *projected traffic congestion at the identified intersections* or alleviate it to the satisfaction of the MDOT. . . .

Intv.'s Memo, at 22-23 & n. 8 (emphasis added). Notwithstanding this apparent concession, intervenor then made the following assertion at oral argument, which suggested a conclusion reached by URS that traffic congestion at northbound and southbound intersections would be of little to no impact:

> [T]he low rating, the F rating or E rating that was reflected in their study, is traffic on the intersection that travels northbound on the 22 but they found all of the casino traffic goes – it is either east or west. I can't remember which, on route 42.

Tr. Oral Arg., at 68-69. Intervenor continued:

> *Therefore, they found that the casino traffic would not have any affect, significant or otherwise, on whatever traffic problems may exist going north or south.* In fact, . . . the URS Corporation's expert traffic study . . . reveals [ ] that in terms of casino traffic which is on route not route 22, the peak volume is 70 trips per hour.
>
> In other words one car every minute will be going over this road in a different direction in the eastbound direction and westbound 40 trips per hour during the peak hour that was studied.
>
> I mean, it is not the burden of this court *and it is not the office of this court to second-guess what the URS experts reviewed not once but twice and what the BIA* and the NIGC and the Michigan Department of Transportation and the Allegan County Roads Commission have all *concluded is not a significant impact.*
>
> *But it speaks volumes about how weak NEPA arguments are* that we are reduced to arguing about whether, in fact, with respect

> to this one intersection they came to the right conclusion.

Id. at 69 (emphasis added). Putting aside intervenor's opinion of the relative strength of NEPA challenges, the Court will assume that the Bradley Property, if converted into a casino, would place a significant burden on northbound and southbound intersections. But that is not the end of the inquiry.

Turning to analyze the proposed mitigation measures, then, the following is proposed within the EA: building a "right turn lane from the northbound US-131 off-ramp turning onto 129th Avenue, eastbound" to mitigate the impact on northbound traffic, and installing an "all-way stop control at the US-131 southbound ramps/129th Avenue intersection" to mitigate the impact on southbound traffic. AR 189-90. The EA concludes that such mitigation measures will reduce traffic congestion to acceptable levels, *id.*, which is a conclusion that plaintiff has not shown to be flawed under NEPA. Further, it is important to again note that all of the mitigation measures proposed in response to the anticipated environmental impacts of the Bradley Property – including traffic impacts at the northbound and southbound intersections – are *enforceable*. *See* Intv.'s Reply, at 18 ("[T]he Tribe expressly agreed to waive its sovereign immunity vis-à-vis the local agencies for purposes of enforcing those agreements (AR 221-222, 239), and it possesses no sovereign immunity vis-à-vis the federal government in any event. . . . Accordingly, the BIA

can enforce the mitigation upon which its FONSI rests. . . .").

And with regard to the input of state and local agencies, intervenor asserts that defendants conducted a study with the input of MDOT and the Allegan County Road Commission, and concluded that Hopkins, Michigan and areas close to the Bradley Property would not be significantly impacted. Intv.'s Memo, at 26 (discussing Hopkins, Michigan (citing AR 115-16; 509-17; 1090)); Intv.'s Reply, at 25 ("Both MDOT and the Board of County Road Commissioners of Allegan County . . . concluded the project, as mitigated, would not adversely affect traffic flows." (citing AR 586-90)). Plaintiff counters that MDOT could not have agreed with the traffic study because a letter from the state agency expressing support for the finding "was written **before** Defendants' traffic study was completed on November 2, 2001." Pl.'s Opp., at 41 (citing AR 442). Similarly, plaintiff argues that a "letter from the [Allegan] Board of Road Commissioners [ ] dated **March 13, 2003**" is also irrelevant to the administrative finding because it was written "three months before Defendants completed their traffic study on the Village of Hopkins on June 6, 2003[.]" *Id.* at 42 (citing AR 590) (emphasis in original).

Despite plaintiff's objection, it is apparent that both MDOT and the Allegan County Road Commission supported the traffic mitigation measures that are proposed within the EA. The MDOT initially expressed its support by submitting a "plan and field

review" of the Bradley Property on September 25, 2001. AR 586-87. This document preceded the final traffic study by *less than* two months. Pl.'s Opp., at 41 ("Defendants' traffic study was completed on November 2, 2001."); Intv.'s Reply, at 26 (same). The Court concludes that the brief passage of time between MDOT's submission of the "plan and field review" and the final traffic study does not support the *reasonable inference* that "MDOT was *not aware* of the significant traffic problems identified by Defendants in their study[,]" Pl.'s Opp., at 41 (emphasis added), nor does it undermine the proposed mitigation measures. As further evidence of its support, MDOT submitted an additional document on February 12, 2002 which conveyed its favorable opinion of the administrative finding. AR 589.

And with regard to the Allegan County Road Commission and its stance on Hopkins, Michigan, the local agency initially expressed that the Bradley Property, if converted into a casino, would pose "no significant impact to the roadways under [its] jurisdiction. . . ." *Id.* at 590. However, the Village of Hopkins requested reconsideration following this traffic study, prompting defendants to re-examine the potential impacts on the Hopkins area. *Id.* at 510-11. Defendants conducted the second study with the input of the Allegan County Road Commission and, as before, the Commission concluded that the Bradley Property would pose no significant traffic problems. *Id.*

In sum, upon consideration of the EA's extensive analysis of the cumulative environmental impacts of the Bradley Property, plaintiff's argument falls short of demonstrating that the actions of defendant were arbitrary, capricious, or an abuse of discretion. On this claim, there are no issues of material fact in dispute.

III. Authorization of Class III Gaming

Plaintiff claims that defendants cannot lawfully authorize Class III gaming at the Bradley Property under IGRA in the absence of a tribal-state gaming compact. Complaint, at ¶ 7; *see* Def.'s Memo, at 2. Defendants and intervenor counter, *inter alia,* that the absence of a tribal-state compact should not stand as an impediment to acquiring the Bradley Property in trust. *See* Def.'s Memo, at 47; Intv.'s Memo, at 48.

IGRA divides gaming into three classes. *Narragansett Indian Tribe v. National Indian Gaming Comm'n,* 332 U.S. App. D.C. 429, 158 F.3d 1335, 1337 (D.C. Cir. 1998).

> "Class I gaming is described as 'social games solely for prizes of minimal value or traditional forms of Indian gaming.' 25 U.S.C. § 2703(6). Class II gaming includes games of chance such as bingo or poker. See 25 U.S.C. § 2703(7). All other forms of gaming are listed under Class III. See 25 U.S.C. § 2703(8). Each class is progressively more regulated."

Vending v. Nat'l Indian Gaming Comm'n, 2001 U.S. Dist. LEXIS 26013, at *3 n.2 (D. Fla. April 5, 2001).

With regard to Class III gaming, which is the focus of plaintiff's challenge here, IGRA "permits such activities on Indian lands provided that five requirements are met." *United States v. Garrett,* 122 Fed. Appx. 628, 630 (4th Cir. 2005). Among these requirements, IGRA provides that the gaming activities must be: "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State[.]" *Id.* (quoting 25 U.S.C. § 2710(d)(1)(C)).

Regarding IGRA and the issue of tribal-state compacts, the overwhelming weight of authority is clear: "[A]n Indian tribe may conduct [Class III] gaming activities *only* in conformance with a valid compact between the tribe and the State in which the gaming activities are located." *Seminole Tribe v. Fla.,* 517 U.S. 44, 47, 116 S. Ct. 1114 (1996) (emphasis added); *accord United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co.,* 451 F.3d 44, 49 (2d Cir. 2006) ("Class III gaming is to be regulated by compacts between states and tribes."); *Lac Du Flambeau Band v. Norton,* 422 F.3d 490, 492-93 (7th Cir. 2005) ("The IGRA allows tribes to operate casinos on their reservations or on lands held in trust for their benefit . . . *only* if conducted pursuant to an agreement between the tribe and the state. . . ." (emphasis added)); *N. Arapaho Tribe v. Wyoming,* 389 F.3d 1308, 1310 (10th Cir. 2004) ("Under the IGRA," to engage in Class III gaming, "a tribe *must* negotiate

with the state and enter into a 'tribal-state' compact. . . ." (emphasis added)); *Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 716 (9th Cir. 2003) (discussing "IGRA's [Class III] compacting *requirement*" (emphasis added)).

However, a tribal-state compact is *not required* to engage in Class II gaming. *Seneca Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n,* 327 F.3d 1019, 1023 (10th Cir. 2003) ("Class II gaming may be conducted in Indian country without a tribal-state compact." (citation omitted)); *accord Diamond Game Enters. v. Reno,* 343 U.S. App. D.C. 351, 230 F.3d 365, 367 (D.C. Cir. 2000); *United States v. Santee Sioux Tribe of Neb.,* 324 F.3d 607, 611 (8th Cir. 2003); *United States v. 103 Elec. Gambling Devices,* 223 F.3d 1091, 1094 (9th Cir. 2000).

As of the date of oral argument in this case, intervenor had not secured a tribal-state compact. Tr. Oral Arg., at 14 (admission by defendants that "there is no compact[.]"). Defendants previously attributed this fact to a vote in "the Michigan Senate [ ] to rescind the resolution that awarded a compact to [intervenor] . . . before the Governor was able to sign the compact." Def.'s Memo, at 10. Whatever the case, defendants recognize that Class III gaming can only be conducted on Indian land "in conformance with a Tribal State compact." *Id.* at 9 (citing 25 U.S.C. § 2710(d)). Defendants maintain, however, that intervenor will "operate a Class II facility on the site [ ] if a Tribal State compact is not negotiated and signed with the State of Michigan." Def.'s Memo, at

10. Intervenor echoed this sentiment, arguing that after defendants take the Bradley Property into trust, it "will be free to offer Class II gaming, as no compact with the state is required" under this scenario. Intv.'s Memo, at 49 (citations omitted).

Plaintiff does not dispute the substance of the counter arguments or attempt to distinguish the cases regarding Class II gaming, but has instead responded this way:

> The EA fails to address what becomes of these measures now that [intervenor] has no compact. Will they simply be abandoned? If not, how will they be paid for? The EA does not say, because it was written on the false assumption that [intervenor] would have a compact.

Pl.'s Opp., at 33-34.

Plaintiff's foregoing response does not aid its argument that the absence of a tribal-state compact should prevent defendants from acquiring the Bradley Property in trust. The alternative solution put forward by defendants and intervenor, which is to offer Class II gaming until the Class III gaming requirements are met, is in full compliance with IGRA. *Diamond Game Enters.*, 230 F.3d at 367. Consequently, there is no genuine issue of material fact as to the absence of a tribal-state gaming compact.

IV. Delegation of Legislative Authority

Finally, the Court addresses plaintiff's argument that defendants' intent to place the Bradley Property in trust disregards the Constitution's limitation on delegated legislative power. Complaint, at ¶ 4. More specifically, plaintiff argues that § 5 of the IRA is "a standardless delegation of legislative authority by congress," and is therefore unconstitutional. Pl.'s Opp., at 49. Defendants and intervenor regard plaintiff's argument to be an incorrect reading of constitutional law. *See* Intv.'s Memo, at 50; Def.'s Memo, at 50.

"[D]erived from the . . . Constitution's mandate that 'all legislative Powers herein granted shall be vested in a Congress of the United States,' U.S. Const. Art I, § 1,'" the non-delegation "doctrine prohibits Congress from delegating its entire legislative power to another branch of government." *United States v. Walker,* 910 F. Supp. 837, 850 (N.D.N.Y. 1995) (citing *Mistretta v. United States,* 488 U.S. 361, 372, 109 S. Ct. 647 (1989)). Despite this constitutional mandate, the doctrine does "not prevent Congress from obtaining the assistance of the coordinate branches." *National Federation of Federal Employees v. United States,* 284 U.S. App. D.C. 295, 905 F.2d 400, 404 (D.C. Cir. 1990) (citation omitted). The Supreme Court has developed the "intelligible principle" test to determine if Congress violated the non-delegation doctrine. *Id.* The test provides that as "long as Congress '*shall lay down an intelligible principle* to which the person or body authorized to

[exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406, 409, 48 S. Ct. 348 (1928) (other citation omitted) (emphasis and alterations in original)). The Court "has not invalidated legislation on non-delegation grounds in over fifty years." *Id.* Indeed, "[o]nly *the most extravagant delegations of authority,* those *providing no standards to constrain administrative discretion,* have been condemned . . . as unconstitutional." *Humphrey v. Baker,* 270 U.S. App. D.C. 154, 848 F.2d 211, 217 (D.C.Cir.), *cert. denied,* 88 U.S. 966, 109 S. Ct. 491 (1988) (emphasis added). Measured against the foregoing legal standard, plaintiff's argument is unpersuasive.

Preliminarily, it is important to note here that plaintiff does not argue that defendants have violated the IRA. *See* Pl.'s Opp., at 49. Rather, it is plaintiff's position that a portion of the IRA is itself unconstitutional. Complaint, at ¶ 4. Applying the "intelligible principle" test to the statute, then, the Court's task is to determine whether § 5 qualifies as a "most extravagant delegation[ ] of authority," "providing no standards to constrain administrative discretion. . . ." *Humphrey,* 848 F.2d at 217.

Section 5 provides the following:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire

> through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 465.

The statute cannot be read in isolation – as plaintiff has done – because it works in conjunction with administrative regulations to provide the standards for the administrative exercise of discretion. *United States v. Roberts,* 185 F.3d 1125, 1136 (10th Cir. 1999). In other words, while § 5 "authorizes the Secretary to take certain lands into trust for the benefit of an Indian tribe [,]" "[t]he *procedures governing the Secretary's exercise of discretion in this regard* are set forth in Department of Interior regulations." *Connecticut ex rel. Blumenthal v. United States DOI,* 228 F.3d 82, 85 (2d Cir. 2000) (citing 25 U.S.C. § 465; 25 C.F.R. § 151) (other citations omitted) (emphasis added). This is apparent from a plain language reading of the notes to § 5, which state that the statute "is implemented by the BIA in its regulations concerning '*land acquisitions*'. . . ." *McAlpine v. United States,* 112 F.3d 1429, 1431 (10th Cir. 1997) (citing 25 C.F.R. § 151) (emphasis added).

"In evaluating requests to acquire land in trust status, the regulations provide that the Secretary, or

his or her authorized representative, *shall consider*" the factors below:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purpose for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs,
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

Id. at 1432 (citation omitted) (emphasis added). Further, "[i]n the event that the Secretary determines that a request should be denied, the regulations *require* the Secretary to inform the applicant as to the reasons *in writing* and notify him or her of the *right*

to appeal this decision. . . ." *Id.* (citation omitted) (emphasis added).

Clearly, not only does the preceding regulatory scheme, which the agency is obliged to follow pursuant to § 5, "require" the Secretary to consider a host of enumerated factors, *id.* at 1431, it also provides for written decisions when applications are denied and appellate review of those decisions. 25 C.F.R. § 151.10-11. The Court therefore concludes that in enacting § 5, "Congress clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta,* 488 U.S. at 372 (citations and internal quotation marks omitted).[18]

Accordingly, plaintiff's claim that § 5 of the IRA violates the non-delegation doctrine fails as a matter of law.

CONCLUSION

For the reasons set forth above, the United States Motion to Dismiss or in the Alternative for

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[18] *Cf. TOMAC,* 433 F.3d at 867 ("We categorically reject the suggestion that the Secretary has been given no direction as to where she is to take land into trust for the Tribe. It is obvious here that the Secretary's delegated authority . . . is cabined by 'intelligible principles' delineating both the area in and the purpose for which the land should be purchased. We therefore find that Congress's delegation to the agency was lawful.").

Summary Judgment [#33], and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians' Motion for Judgment on the Pleadings or, in the Alternative for Summary Judgment [#32] will be granted. An appropriate Order will follow this Opinion.

Date: February 23, 2007 **JOHN GARRETT PENN**
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5092 **September Term 2007**

05cv01181

Filed On: July 25, 2008

Michigan Gambling Opposition,
A Michigan Non-profit Corporation,

Appellant

v.

Dirk Kempthorne, In his official capacity as Secretary of the United States Department of the Interior, et al., et al.,

Appellees

BEFORE: Sentelle,* Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown,* Griffith,* and Kavanaugh, Circuit Judges

ORDER

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of

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* Chief Judge Sentelle, and Circuit Judges Brown and Griffith would grant the petition.

the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5092 **September Term 2007**

05cv01181

Filed On: August 15, 2008

Michigan Gambling Opposition,
A Michigan Non-profit Corporation,

Appellant

v.

Dirk Kempthorne, In his official capacity as Secretary of the United States Department of the Interior, et al., et al.,

Appellees

BEFORE: Ginsburg, Rogers, and Brown, Circuit Judges

ORDER

Upon consideration of appellant's emergency motion for stay of mandate pending petition of certiorari, and the oppositions thereto, it is

ORDERED that the motion for stay be granted.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Supreme Court of the United States

No. 08A184

MATCH-E-BE-NASH-SHE-WISH BAND
OF POTTAWATOMI INDIANS

Applicant,

v.

MICHIGAN GAMBLING OPPOSITION

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, and the response filed thereto

The motion to vacate the stay entered by the Court of Appeals is denied. See *Commodity Futures Trading Comm'n* v. *British American Commodity Options Corp.*, 434 U. S. 1316, 1319 (1977) (Marshall, J., in chambers) ("Since the Court of Appeals was quite familiar with this case . . . its determination that stays were warranted is deserving of great weight").

/s/ John G. Roberts, Jr.,
Chief Justice of the United States

Dated this 3rd
day of September, 2008.

OPPOSITION BRIEF

No. 08-554

Supreme Court, U.S.
FILED
DEC 5 - 2008
CLERK

IN THE

Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION,
Petitioner,

v.

DIRK KEMPTHORNE, SECRETARY OF INTERIOR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

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QUESTIONS PRESENTED

1. Whether Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power to the Secretary of the Interior.

2. Whether the Court should hold this case pending the resolution of *Carcieri* v. *Kempthorne*, No. 07-526, for possible remand to the court of appeals on a question that has never been properly presented in this case and was not considered by either court below.

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IN THE

Supreme Court of the United States

No. 08-554

MICHIGAN GAMBLING OPPOSITION,
Petitioner,

v.

DIRK KEMPTHORNE, SECRETARY OF INTERIOR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 525 F.3d 23. The opinion of the district court (Pet. App. 36) is reported at 477 F. Supp. 2d 1.

JURISDICTION

The court of appeals denied petitioner's petition for rehearing en banc on July 25, 2008. The petition for a writ of certiorari was filed on October 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Section 5 of the Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to acquire into trust, for the benefit of Indians and Indian Tribes, "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The Secretary exercises this authority pursuant to regulations published at 25 C.F.R. pt. 151.

In May 2005, the Secretary agreed to take a parcel of land into trust for respondent the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians. The land would give the Tribe a federally-recognized land base near its traditional home and allow it to pursue economic development through the construction and operation of a gaming facility, in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* Pet. App. 38. The Secretary's decision followed a lengthy administrative process that began in August 2001. *Id.* at 40. The Tribe's request was (and is) actively supported by the local government with jurisdiction over the land at issue, and no state or other government has ever objected to the proposed trust acquisition.[1] But private interests opposed to the Tribe's planned gaming facility announced their intent to delay the acquisition through litigation—and so far they have

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[1] Moreover, while the case was pending before the court of appeals, the Governor of the State of Michigan executed a compact with the Tribe under IGRA, 25 U.S.C. § 2710(d)(1)(C), which would allow the Tribe to conduct Class III (*i.e.*, casino-style) gaming on the land at issue. The Michigan State House of Representatives has ratified the compact, which is now pending ratification in the Michigan State Senate.

succeeded, despite the failure of their legal arguments at every stage. Now they ask this Court to consider one question on which there is no circuit split and which the Court has repeatedly (and very recently) declined to review, and another question that has never been properly presented in this case. There is no ground for further review. It is time for this litigation to end.

1. Congress enacted the Indian Reorganization Act of 1934 to ensure that "Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974), than had been possible under previous federal removal and allotment policy, which had decimated tribal landholdings. *See, e.g., County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). The legislation was intended "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism," *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-152 (1973) (quotations omitted), in large part by "conserv[ing] and develop[ing] Indian lands and resources." Pub. L. No. 73-383, 48 Stat. 984, 984 (1934). Section 5 of the IRA authorizes the Secretary to pursue those goals by "acquir[ing], through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . for the purpose of providing lands for Indians." 25 U.S.C. § 465.

2. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians is a federally-recognized Indian Tribe whose aboriginal territory is located in the present-day State of Michigan. The Tribe's government-to-government relationship with the United States was formally recognized no later than 1821, when Chief Match-E-Be-Nash-She-Wish signed a treaty that

granted the Tribe a federal reservation near present-day Kalamazoo, Michigan. *See* 62 Fed. Reg. 38,113 (July 16, 1997) (Notice of Proposed Finding). While the Tribe was a party to other treaties with the United States in the nineteenth century, it lost its last reservation land under an 1833 treaty that the Tribe did not sign. *See* Treaty of September 26, 1833, 7 Stat. 431. Nevertheless, the Tribe maintained its distinct identity throughout U.S. history, and its status as a recognized Tribe was never lawfully terminated. 62 Fed. Reg. 38,113-38,114.

The Secretary formally acknowledged the Tribe's federally-recognized status in 1999. *See* 63 Fed. Reg. 56,936 (Oct. 23, 1999) (Notice of Final Determination).[2] The Secretary expressly found that the Tribe comprised a distinct Indian community; that the Tribe had continuously existed as a discrete American Indian entity from the date of its last annuity payments in 1870 through the present; that the Tribe had a substantially continuous historical identification of political leadership; and that the Tribe had never been the subject of any legislation terminating its relationship with the

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[2] Petitioner incorrectly suggests that the Tribe conditioned its petition for federal acknowledgement on the representation that "there would never be casinos in our Tribe." Pet. 8 (quotations omitted). That allegation is unsupported as well as irrelevant. The document on which petitioner relies was "unratified [and] undated" (Court of Appeals Joint Appendix (CAJA) 1897), and there were no "minutes . . . or other documentation . . . to support" or substantiate it. CAJA 1863. The Secretary's acknowledgment of the Tribe makes no reference to any such representation (63 Fed. Reg. 56,936), and nothing in the applicable regulations would permit consideration of such a representation in connection with the acknowledgement process. *See* 25 C.F.R. pt. 83.

United States. *See* 63 Fed. Reg. 56,936, *affirming proposed findings at* 62 Fed. Reg. 33,113.

Acknowledgement alone did not provide the Tribe with a reservation or other federally-protected trust lands on which it could exercise territorial sovereignty and pursue economic self-sufficiency.[3] Thus, in 2001, pursuant to Section 5 of the IRA, the Tribe asked the Secretary to accept into trust a 146-acre parcel of disused industrial land so that the Tribe could redevelop the land into a gaming facility that would provide a federally-recognized land base, as well as much-needed economic and other benefits for Tribe's members and the local community. The Tribe's proposal garnered widespread support. In fact, no state or local government with jurisdiction over the land has ever objected; the local government with jurisdiction actively supported (and supports) the proposal; the Governor of Michigan and the state House of Representatives have approved a compact that would allow the Tribe to con-

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[3] The Match-E-Be-Nash-She-Wish Band of Potawatomi Indians is now the only federally-recognized Indian Tribe in Michigan that does not have reservation or federally-protected trust lands. All eleven of the other federally-recognized Indian Tribes in Michigan currently operate (or are in the process of constructing) casinos pursuant to tribal-state gaming compacts. *See* http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182---,00.html (last visited Dec. 5, 2008). The tribes operating casinos under those compacts annually pay tens of millions of dollars in revenues to the State and to local governments. *See* http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182-11370--,00.html (last visited Dec. 5, 2008).

duct full casino gaming on the land at issue; and the compact is pending ratification in the Michigan Senate.[4]

3. The Secretary approved the Tribe's request on May 13, 2005, after a lengthy administrative process. *See* 70 Fed. Reg. 25,596 (May 13, 2005) (Notice Of Final Agency Determination). On June 13, 2005, petitioner filed this action in the U.S. District Court for the District of Columbia. The complaint asserted that the Secretary's decision to accept land into trust violated the National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*) and the Indian Gaming Regulatory Act (25 U.S.C. § 2719), and that the statute authorizing the Secretary's action (Section 5 of the IRA) was an unconstitutional delegation of legislative power. Petitioner's complaint was not supported by any state or local government. In fact, the local government that has jurisdiction over the land at issue filed an amicus brief *supporting* the Tribe. Joint Amicus Curiae Brief of Wayland Township, et al., *Michigan Gambling Opposition* v. *Norton*, No. 05-CV-01181 (D.D.C. Jan. 19, 2006). After more than twenty months of litigation delay, the district court rejected all of petitioner's claims and dismissed the complaint on February 23, 2007. Pet. App. 83-84.

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[4] The compact includes, pursuant to IGRA, provisions regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State" on the land at issue. 25 U.S.C. § 2710(d)(3)(C)(i). The Tribe has also concluded agreements with state and local governments concerning law enforcement, emergency services, and taxes. *See* CAJA 119, 121; http://www.michigan.gov/taxes/0,1607,7-238-43513_43517---,00.html (last visited Dec. 5, 2008).

4. Petitioner appealed, raising only its NEPA and nondelegation claims. Four months after oral argument, more than six months after briefing was completed, and shortly after this Court denied review on the Section 5 nondelegation question in *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008), petitioner asked the court of appeals to "supplement the issues" in this case with the question on which the Court granted review in *Carcieri*: How to construe the definition of "Indian tribe" in Section 19 of the IRA, which refers to members of "any recognized Indian tribe now under Federal jurisdiction." *See id.* (argued Nov. 3, 2008). The court of appeals rejected petitioner's request and declined to consider the untimely-raised *Carcieri* issue. Order, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. Mar. 19, 2008).

On April 29, 2008, the court of appeals affirmed the dismissal of petitioner's complaint. Pet. App. 3. In rejecting petitioner's nondelegation claim, the court observed that Section 5 is "no broader than other statutes, which the Supreme Court has upheld" against such challenges. *Id.* at 14. It reasoned that the IRA supplies an "intelligible principle" to guide the Secretary's discretion because, in acquiring land "for the purpose of providing land for Indians," the Secretary must "exercise his powers in order to further economic development and self-governance" among Indian Tribes. *Id.* at 15. Accordingly, Section 5 "is not an unconstitutional delegation of legislative authority." *Id.* at 3, 20. Judge Brown dissented from the court's decision.

Petitioner sought en banc rehearing on its nondelegation claim, and on its belated *Carcieri* claim. The full court rejected that petition on July 25, 2008 (Pet. App. 85-86), after requesting a response from the United

States and the Tribe on the nondelegation question, but not on the *Carcieri* issue. Order, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. May 20, 2008).[5]

REASONS FOR DENYING THE PETITION

1. Petitioner seeks review of its claim that Section 5 of the IRA violates the nondelegation doctrine. That question is properly presented, but it does not warrant review.

a. This Court has considered petitions for certiorari on this same issue three times over the past three years. It has denied review every time, most recently in *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008) (granting certiorari but limiting review to exclude nondelegation challenge to Section 5). *See also South Dakota* v. *Department of Interior*, 549 U.S. 813 (2006) (denying certiorari); *Utah* v. *Shivwits Band of Paiute Indians*, 549 U.S. 809 (2006) (same). There is no reason

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[5] The district court had stayed its judgment in favor of the Secretary and the Tribe pending resolution of proceedings in the court of appeals. *See* Order, *Michigan Gambling Opposition* v. *Norton*, No. 1:05-CV-01181 (D.D.C. Mar. 5, 2007). After the court of appeals affirmed and rehearing was denied, petitioner moved to stay that court's mandate pending the filing and disposition of a petition for certiorari. Over the opposition of the Tribe and the United States, the court of appeals granted a stay, without explanation, on August 15, 2008. *See* Order, *Michigan Gambling Opposition* v. *Kempthorne*, Case No. 07-5092 (D.C. Cir. Aug. 15, 2008)). The Chief Justice denied the Tribe's application (unopposed by the United States) to vacate the stay. Order, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Michigan Gambling Opposition*, No. 08-A184 (Sept. 3, 2008). The Secretary is thus effectively precluded from acquiring the land in trust until the present petition is denied.

for a different result here—especially in light of the fact that the State of Michigan has never objected to the proposed trust acquisition in this case, and the local government with jurisdiction over the land has actively supported the Secretary's decision. *See* Joint Amicus Curiae Brief of Wayland Township, et al., *Michigan Gambling Opposition* v. *Norton*, Case No. 05-CV-01181 (D.D.C. Jan. 19, 2006).

b. There is no circuit conflict on the nondelegation question. To the contrary, every court of appeals—and every district court—that has resolved a nondelegation challenge to Section 5 has upheld the statute. *See Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-42 (1st Cir. 2007) (en banc), *cert. denied on this question*, 128 S. Ct. 1443 (2008); *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 972-974 (10th Cir. 2005), *reaffirming United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999); *South Dakota* v. *Department of Interior*, 423 F.3d 790 (8th Cir. 2005) ("*South Dakota II*"); *Sauk County* v. *Department of Interior*, No. 07-CV-543, 2008 WL 2225680, at *4 (W.D. Wis. May 29, 2008); *City of Lincoln City* v. *Department of Interior*, 229 F. Supp. 2d 1109, 1128 (D. Or. 2002).

Petitioner suggests a conflict based on one decision that was vacated twelve years ago, and one case that involved irrelevant questions under the Administrative Procedure Act (APA). First, petitioner relies on *South Dakota* v. *Department of Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"). That decision was vacated by this Court, 519 U.S. 919 (1996), has no precedential value, and has since been rejected by the Eighth Circuit itself. *See South Dakota II*, 423 F.3d 790. Second, petitioner quotes out-of-context dicta from *Florida Department of Business Regulation* v. *Department of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985). But the is-

sue in that case was whether decisions under Section 5 of the IRA and related regulations at 25 C.F.R. pt. 151 were "committed to agency discretion by law" under the APA, 5 U.S.C. § 701(a)(2), not whether Section 5 itself violated the nondelegation doctrine. *Florida Department of Business Regulation*, 768 F.2d at 1255-1257.

c. In any event, the decision below is correct. The only "question [in a nondelegation challenge] is whether the statute has delegated legislative power," *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001), and this Court has made clear that only the most sweeping delegations will fail that test. *See, e.g., id.* at 474-475 ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.") (quotations omitted). So long as Congress establishes an "intelligible principle" to guide the implementing agency in administering the statute, even a broad delegation of regulatory power will be sustained. *Touby* v. *United States*, 500 U.S. 160, 165 (1991).

Section 5 of the IRA provides such an intelligible principle. The statute expressly limits land acquisitions to those that serve the "purpose of providing land for Indians," specifies the means by which land may be acquired (i.e., consensually), and subjects acquisitions by purchase to a limited authorization and the further oversight of the appropriations process. 25 U.S.C. § 465. The purposive limitation by itself is sufficient to satisfy the constitutional requirement because, as the court of appeals held, it requires the Secretary "to exercise his powers in order to further economic development and self-governance among the Tribes." Pet. App. 15; *see also Carcieri*, 497 F.3d at 41-43; *Shivwits*,

428 F.3d at 972-974; *South Dakota II*, 423 F.3d at 797-798. That guide for the exercise of the Secretary's authority is at least as clear as an agency's determination of what is "fair" or "equitable" (*American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946); *Yakus* v. *United States*, 321 U.S. 414, 420, 423-426 (1944)) or "in the public interest" (*National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24-25 (1932)).

Moreover, Section 5 of the IRA does not authorize the Secretary to make any law; to promulgate any rule restricting private conduct; to compel any act; or to impose any tax—and its limited authorization for purposes of land acquisition pales in comparison to general appropriations this Court has upheld without particular scrutiny under the nondelegation doctrine. *See, e.g.*, *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitutionality of this delegation of authority has never been seriously questioned.").[6]

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[6] As the Tribe argued below (Tribe Appeal Br. 47-49), it is not clear why the "intelligible standards" requirement should even apply to a statute such as Section 5, which does not delegate any lawmaking or rulemaking power at all. The Court has rarely discussed the nondelegation doctrine outside the rulemaking context, and when it has it has dispatched the issue quickly. *See, e.g.*, *Cincinnati Soap*, 301 U.S. at 322; *Clinton* v. *City of New York*, 524 U.S. 417, 466-467 (1998) (Scalia, J., dissenting) ("From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. . . . The constitutionality of such appropriations has never seriously been questioned).

d. The dissenting opinion below provides no basis for granting certiorari. Pet. App. 20-31. The dissent asserts that the limiting purpose of Section 5 cannot be "derived from the text of the [statute]," and that the statute is "tautological" and devoid of meaning. *Id.* at 28.[7] But the dissent reached that conclusion only by abandoning traditional rules of statutory interpretation. Section 5 limits the Secretary's authority to land acquisitions which serve "the purpose of providing lands for Indians." The text of that provision must be interpreted in light of the historical context in which Section 5 was enacted; the surrounding statutory text and the text and structure of the statute as a whole; longstanding precedent construing the purposes behind the IRA; and the rule that statutes should be construed to avoid constitutional questions. *See, e.g., American Power & Light*, 329 U.S. at 104 ("the statutory language may derive content from the purpose of the [statute], its factual background and statutory context.") (quotations omitted); *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989) (noting cases which narrowly construed statutes to avoid or reject nondelegation challenges). The court of appeals properly interpreted Section 5 in light of these principles, and cor-

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[7] Petitioner and the dissent err in asserting that federal courts have "consistently" interpreted Section 5 of the IRA to provide "unfettered discretion" (Pet. 12, 18; Pet. App. 28, 31) that "encompasses any possible acquisition" (*id.*). Every court confronted with a nondelegation challenge to Section 5 has concluded otherwise. *See, e.g., Carcieri*, 497 F.3d at 41-43; *Shivwits*, 428 F.3d at 972-974; *South Dakota II*, 423 F.3d at 797-798; *Roberts*, 185 F.3d at 1136-1137; *Sauk County*, 2008 WL 2225680, at *4; *Lincoln City*, 229 F. Supp. 2d at 1128.

rectly concluded that there is nothing tautological about it. Pet. App. 15.

2. Petitioner also seeks review of a question that it improperly attempted to raise at the eleventh hour below—namely, whether the Tribe and its members are "Indians" and an "Indian tribe" under the definitions set out in Section 19 of the IRA, 25 U.S.C. § 479.[8] The court of appeals twice recognized that petitioner waived that claim by failing to raise it until after this Court granted review of a similar question in *Carcieri*—well after the appeal in this case was briefed and argued. First, the court of appeals denied petitioner's motion to supplement the issues on appeal after oral argument. Order, *Michigan Gambling Opposition* v. *Kempthorne*, Case No. 07-5092 (D.C. Cir. Mar. 19, 2008). Second, the court rejected petitioner's request for rehearing en banc without requesting a response on this issue. *See* Order, *Michigan Gambling Opposition* v. *Kempthorne*, No. 07-5092 (D.C. Cir. May 20, 2008) (requesting response on the nondelegation question, but not on the *Carcieri* issue).

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[8] The courts, in any event, lack jurisdiction to consider petitioner's statutory claim, as petitioner's alleged injuries fall outside of, and indeed are directly inconsistent with, the "zone of interests" protected by the IRA. *Clark* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987) ("if the [party's] interests are marginally related to or inconsistent with the purposes implicit in the statute," it will not have prudential standing to bring a claim under the Administrative Procedures Act). *See, e.g., City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465, 468 (D.D.C. 1978) (no standing under Section 5 of the IRA for private non-Indian taxpayers); *Western Shoshone Bus. Council* v. *Babbitt*, 1 F.3d 1052, 1054 (10th Cir. 1993) (no standing for private law firm to challenge Secretary's decision not to review a contract under 25 U.S.C. § 81).

There is no reason for this Court to depart from its ordinary practice and consider an issue that was neither timely raised in nor addressed by the courts below. *See, e.g., Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was "inadequately preserved in the prior proceedings"); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *accord Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982).[9]

Petitioner seeks to avoid that result by invoking cases that involved exceptional circumstances (not present here), where this Court excused parties for failing to timely raise arguments that had previously been "futile" because they were contrary to established precedent. *See, e.g., Standard Indus., Inc.* v. *Tigrett Indus., Inc.*, 397 U.S. 586, 587 (1970) (allowing previously "futile" argument to be raised after contrary precedent had been "specifically overruled"); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 144 (1967) (excusing failure to timely raise issue in light of previous "strong precedent" that civil libel actions were immune from consti-

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[9] There is likewise no justification for holding the present petition pending this Court's decision in *Carcieri*. Even if this case were returned to the court of appeals after a decision in *Carcieri*, ordinary waiver principles would preclude petitioners from advancing in that court a claim they first raised after oral argument on appeal. *See Hussain* v. *Nicholson*, 435 F.3d 359, 364 (D.C. Cir. 2006) (declining to hear arguments raised for the first time on appeal); *Worldwide Moving & Storage, Inc.* v. *District of Columbia*, 445 F.3d 422, 427 n.7 (D.C. Cir. 2006) (declining to hear arguments raised for the first time after oral argument).

tutional scrutiny). Those cases are inapposite. Petitioner's argument in this case is based on statutory language that has not changed during the course of these proceedings, and there was no established precedent in this Court or the court of appeals that would have made the argument legally futile in the district court or the court of appeals.[10]

In any event, even if the Court accepts petitioner's statutory argument in *Carcieri*, the Tribe in this case was a "recognized Indian tribe . . . under Federal jurisdiction" (25 U.S.C. § 479) when the IRA was enacted in 1934. The administrative record demonstrates that the Tribe was recognized by the United States no later than 1821, when it signed a treaty granting it a federal reservation near Kalamazoo (*see* 62 Fed. Reg. 38,113), and that the Tribe's federally-recognized status has never been lawfully terminated (*id.* at 38,114; *see also* 63 Fed. Reg. 56,936, *affirming proposed findings*).

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[10] Indeed, by the time petitioner filed its complaint in this case, the plaintiffs in *Carcieri* had been arguing the IRA Section 19 issue for several years, producing at least two published decisions of which petitioner presumably (*see* Pet. 29) was aware. *See Carcieri* v. *Norton*, 290 F. Supp. 2d 167, 172, 178-181 (D.R.I. 2003), *aff'd*, 398 F.3d 22, 29-32 (1st Cir. 2005), *superseded on rehearing*, 423 F.3d 45, 53-56 (1st Cir. 2005); *superseded on rehearing en banc Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (2007). Moreover, the *Carcieri* plaintiffs relied heavily on *dictum* that they claimed supported their position from this Court's decision two decades ago in *United States* v. *John*, 437 U.S. 634, 649 (1978) (dicta referring to "1934"); *see also United States* v. *Tax Comm'n*, 505 F.2d 633 (5th Cir. 1974) ("tribal status is to be determined as of June, 1934"). Petitioner may have decided for strategic reasons not to raise the issue in this case, but the Section 19 argument was no more unavailable here than it was in *Carcieri* itself.

Petitioner's argument depends on a distortion of the record, along with statements taken out of context from briefing that did not address issues under Section 19 of the IRA. For example, petitioner asserts that the "BIA determined conclusively that the Tribe's federal acknowledgement ceased in 1870." Pet. 7. That is wrong. As the BIA expressly explained, it chose 1870 as the last date of "unambiguous Federal acknowledgment" (CAJA 1791) solely for purposes of defining the temporal scope of its analysis under 25 C.F.R. 83.8 (certain recognition criteria to be analyzed from date of last unambiguous federal acknowledgment to the present), and "[t]he use of the 1870 date ... in these reports is *not to be regarded as a determination by BIA that unambiguous Federal acknowledgement of the [Tribe's] antecedent group ceased at that date.*" CAJA 1791 (emphasis added).[11]

Petitioner's belated attempt to use a petition for discretionary review in this Court to interject a new issue into a case that has already been fully litigated, at great cost to the Tribe and the United States, lacks both justification and merit and should be rejected.

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[11] The statement petitioner highlights (Pet. 7) from the Tribe's appellate brief was not directed to whether, as of 1934, it was a "recognized Indian tribe ... under federal jurisdiction," 25 U.S.C. § 479, precisely because petitioner had never raised any question concerning the Tribe's IRA status during the briefing on appeal. The Tribe's statement reflects the diminished federal benefits the Tribe received from the BIA after its last annuity payments in 1870. *See* 62 Fed. Reg. 38,113; CAJA 1772 (noting cessation of annuity payments in 1870). As noted above (*see* pp. 4-5, 15-16), however, the Tribe's status was never lawfully terminated—in fact, the BIA expressly confirmed that the Tribe's legal status and relationship to the United States, dating back at least to 1821, were never terminated by Congress. 62 Fed. Reg. 38,114.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008

OPPOSITION BRIEF

No. 08-554

In the Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION, PETITIONER

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, is an unconstitutional delegation of legislative authority to the Secretary of the Interior.

2. Whether the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not a recognized Indian tribe under federal jurisdiction on June 18, 1934, the date on which that statute was enacted.

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In the Supreme Court of the United States

No. 08-554

MICHIGAN GAMBLING OPPOSITION, PETITIONER

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 525 F.3d 23. The opinion of the district court (Pet. App. 36-84) is reported at 477 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2008. A petition for rehearing was denied on July 25, 2008 (Pet. App. 85-86). The petition for a writ of certiorari was filed on October 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized the Secretary of the

Interior (Secretary) to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, * * * for the purpose of providing land for Indians." 25 U.S.C. 465. The Department of the Interior exercises that authority in accordance with regulations found at 25 C.F.R. Pt. 151. In 2005, the Assistant Secretary for Indian Affairs approved the application of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band) to have the Department of the Interior acquire 147 acres of land in Michigan in trust for the Band's benefit. Pet. App. 2.

Petitioner filed suit alleging that the Secretary's decision violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, and that Section 5 of the IRA, 25 U.S.C. 465, is unconstitutional. Pet. App. 6-7. The district court rejected petitioner's claims, *id.* at 36-84, and the court of appeals affirmed, *id.* at 1-35.

1. The Band descends from a band of Pottawatomi Indians, led by Chief Match-E-Be-Nash-She-Wish, who resided near present-day Kalamazoo, Michigan. Pet. App. 3. Under the terms of the 1821 Treaty of Chicago, signed by Chief Match-E-Be-Nash-She-Wish, the Band secured a three-square-mile tract of land at Kalamazoo. C.A. App. 1790, 1795. But the Band became landless in the middle of the Nineteenth Century. Pet. App. 3.

As part of its efforts to avoid being forcibly removed west of the Mississippi, the Band placed itself under the protection of a church mission in central Michigan. Pet. App. 3. In 1894, the mission land was divided into parcels and deeded to descendants of the original Band, but within a few years most of that land was lost through tax foreclosures. *Ibid.*; C.A. App. 1746-1747. Despite the

loss of the land, a majority of the Band's members remained in the vicinity of the church mission. Pet. App. 3.

In 1998, the Band secured federal acknowledgment pursuant to the Department of the Interior's regulations (25 C.F.R. Pt. 83). See 63 Fed. Reg. 56,936 (1998); *In re Acknowledgment of Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 33 I.B.I.A. 291 (1999). In 2001, the Band submitted an application to the Secretary to acquire 147 acres of land in trust for the Band pursuant to the Secretary's authority in Section 5 of the IRA, 25 U.S.C. 465. Pet. App. 40. That property, known as the Bradley property, is located in an area of Michigan to which the Band has long historical, geographical, and cultural ties. *Id.* at 4; C.A. App. 1611. The Band applied for the land to be acquired in trust so that it could conduct gaming on the property to generate revenue necessary to promote tribal economic development, self-sufficiency, and a strong tribal government capable of providing its members with sorely needed social and educational programs. Pet. App. 4; C.A. App. 1742; see also *id.* at 1614. In 2005, the Assistant Secretary issued a decision to take the land into trust. Pet. App. 2.

2. Petitioner filed this lawsuit, asserting four claims challenging the Secretary's decision to take the land into trust: a NEPA claim, two IGRA claims, and a claim that the IRA provision granting the Secretary authority to acquire land in trust was an unconstitutional delegation of legislative authority. Pet. App. 6-7.

The district court rejected each of petitioner's claims. Pet. App. 36-84. The court held that the Secretary's approval of the Band's application to have the land taken in trust complied with NEPA and IGRA. *Id.*

at 44-75. The court also rejected petitioner's nondelegation claim. *Id.* at 79-83.

3. Petitioner appealed, raising only the NEPA and nondelegation claims, Pet. App. 2-3, and abandoning the IGRA claims, *id.* at 7. More than four months after the court of appeals heard oral argument, and over two and a half years after petitioner had filed its complaint initiating this suit, petitioner moved in the court of appeals to supplement the issues on appeal so that it could raise for the first time the question "[w]hether the Indian Reorganization Act of 1934 empowers the Secretary to take land into trust for the [Band], when the Band was not recognized and under federal jurisdiction in 1934." 07-5092 Mot. of Pl.-Appellant to Supp. Issues for Review 6 (D.C. Cir. filed Mar. 7, 2008). Petitioner filed that motion shortly after this Court, in a different case, granted review of a similar question and did not grant review of the nondelegation question. *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008) (No. 07-524) (argued Nov. 3, 2008). The court of appeals denied petitioner's motion to supplement the issues on appeal. 07-5092 Order (D.C. Cir. Mar. 19, 2008).

The court of appeals subsequently affirmed the district court's judgment. Pet. App. 1-35. As relevant here, the court rejected petitioner's claim that Section 5 of the IRA is an unconstitutional delegation of legislative authority to the Secretary. *Id.* at 12-20. The court explained that the delegation in Section 5 is "no broader than other statutes" that this Court has upheld in the face of nondelegation challenges. *Id.* at 14. The court held that "the statute provides an intelligible principle": the Secretary is "to exercise his powers in order to further economic development and self-governance among the Tribes." *Id.* at 15.

Judge Brown dissented in part. Pet. App. 20-35. She would have held that Section 5 is an unconstitutional delegation of legislative authority. *Ibid.*

4. Petitioner sought rehearing en banc on the nondelegation claim as well as the claim that it had belatedly attempted to raise concerning the Band's status in 1934. The court of appeals ordered a response only on the nondelegation issue. 07-5092 Order (D.C. Cir. May 20, 2008). The court denied rehearing en banc, with three judges noting that they would have granted en banc review. Pet. App. 85-86.[1]

ARGUMENT

1. Petitioner argues (Pet. 14-28) that this Court should grant certiorari to consider whether Section 5 of the IRA, 25 U.S.C. 465, is an unconstitutional delegation of Congress's legislative power. The Court has repeatedly denied certiorari in other cases raising that question, and it again declined review earlier this year. See *Carcieri* v. *Kempthorne*, 128 S. Ct. 1443 (2008) (limiting grant of certiorari to "Questions 1 and 2 presented by the petition"). The result here should be the same.

a. Petitioner's claim (Pet. 19) that there is a "[c]ircuit [c]onflict" is incorrect. Each of the courts of appeals that has considered a constitutional challenge to Section 5 on nondelegation grounds—whether before or

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[1] In the district court, petitioner obtained a stay of the Secretary's trust acquisition based on its NEPA and IGRA claims. Petitioner did not assert its nondelegation claim as a basis for a stay. C.A. App. 368 n.2. On petitioner's motion, and over the opposition of the federal respondents and the Band, the court of appeals stayed its mandate pending disposition of this petition for certiorari, thereby maintaining the district court's stay. Pet. App. 87-88. The Chief Justice denied the Band's application to vacate the court of appeals' stay of its mandate. *Id.* at 89.

after this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001)—has upheld the statute's constitutionality. *Carcieri* v. *Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc), cert. granted on other grounds, 128 S. Ct. 1443 (2008); *South Dakota* v. *United States Dep't of the Interior*, 423 F.3d 790, 797 (8th Cir. 2005), cert. denied, 549 U.S. 813 (2006); *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 972-974 (10th Cir. 2005), cert. denied, 549 U.S. 809 (2006); *United States* v. *Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000). Although petitioner relies (Pet. 4, 19-21) on the Eighth Circuit's decision in *South Dakota* v. *United States Department of the Interior*, 69 F.3d 878 (1995), that decision was vacated and remanded by this Court, 519 U.S. 919 (1996). A decision that has been vacated by this Court has no "precedential effect," *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975), and thus cannot establish a circuit conflict. Moreover, it is well settled in the Eighth Circuit that Section 5 of the IRA does not violate the nondelegation doctrine. *South Dakota* v. *United States Dep't of the Interior*, 487 F.3d 548, 551 (8th Cir. 2007); *South Dakota*, 423 F.3d at 797. There is thus no conflict for this Court to resolve.[2]

b. Nor is the issue one otherwise warranting the Court's review despite the unanimity of the courts of appeals in sustaining Section 5. The statutory provision that petitioner seeks to have invalidated was enacted more than 70 years ago, and since that time it has be-

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[2] Petitioner also claims (Pet. 21) that the supposed "conflict" includes the Eleventh Circuit's decision in *Florida Department of Business Regulation* v. *United States Department of the Interior*, 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986). But, as petitioner concedes (Pet. 21), that decision did not "resolv[e] a nondelegation challenge."

come embedded in the practical, day-to-day administration of Indian affairs. For seven decades, Section 5 of the IRA has provided the primary mechanism for the federal government to restore and replace tribal lands. Congress has, moreover, often revisited and amended the IRA, even after the Secretary's promulgation of land-acquisition regulations, without expressing any disagreement with the Secretary's understanding of the statutory policies that are to guide his determinations.[3]

Similarly, this Court has considered Section 5 on numerous occasions and has explained that, along with its implementing regulations, it "provides the proper avenue" for a tribe "to reestablish sovereign authority over [lost] territory." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 220-221 (2005); see also *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (noting that, in Section 5, Congress granted the Secretary "authority to place land in trust, to be held by the Federal Government for the benefit of the Indians," and "explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt"); *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-159 (1973).

At root, petitioner's argument represents a disagreement with longstanding principles embodied in the IRA and numerous other statutes that govern Indian lands

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[3] See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of Section 465).

and Indian self-determination. Against that background, Congress made an explicit policy determination in Section 5 of the IRA to allow the Secretary to take into trust land "within or without existing reservations" and that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. 465.[4]

c. The court of appeals' decision is, moreover, correct. It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)); accord *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (Congress

[4] Petitioner contends (Pet. 25, 28) that the power to exempt lands from State jurisdiction raises special concerns. But petitioner ignores the fact that the regulations promulgated by the Secretary to implement Section 5 address the very concerns petitioner raises about effects on state sovereignty. See *City of Sherrill*, 544 U.S. at 220-221 ("The regulations implementing [Section 5] are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory."). The regulations direct the Bureau of Indian Affairs, when deciding whether to approve a request that it accept land into trust, to consider any "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. 151.10(f). Similarly, when the land to be acquired is held in unrestricted fee status, the BIA must consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," 25 C.F.R. 151.10(e), as well as whether the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," 25 C.F.R. 151.10(g).

must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.").

Petitioner criticizes (Pet. 16-18) the court of appeals for relying on "statutory background and context." But this Court has repeatedly made clear that a statute's "purpose," "factual background," and "context," are properly considered in determining whether a statute establishes intelligible principles. *American Power & Light Co.*, 329 U.S. at 104; see *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) (same); *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) ("context"); *Fahey* v. *Mallonee*, 332 U.S. 245, 253 (1947) ("the background of custom").

Section 5 of the IRA itself contains several express indications of Congress's policy. It states that the purpose of the Secretary's land-acquisition authority is "providing land for Indians." 25 U.S.C. 465. It provides a limited amount of federal funds to be used for the purpose and expressly forbids the use of those funds to acquire land for Navajo Indians outside of their established reservation boundaries. *Ibid.* Finally, it specifies that lands taken into trust "shall be exempt from State and local taxation." *Ibid.*

Further statutory principles for implementing Section 5 are furnished by the purposes and structure of the IRA as a whole. As this Court has previously explained, Congress enacted the IRA to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152-154 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No.

1804, 73d Cong., 2d Sess. 6 (1934)); accord *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (the IRA reflects Congress's "overriding goal of encouraging 'tribal self-sufficiency and economic development'") (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)); *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). In service of that goal, Congress identified "conserv[ing] and develop[ing] Indian lands and resources" as one of the purposes of the IRA. Ch. 576, Pmbl., 48 Stat. 984. Congress was concerned, for example, with reversing the "disastrous" consequences of the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the land base of the affected tribes and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 & n.5 (1994).

Accordingly, the IRA expressly repudiates the allotment policy, 25 U.S.C. 461, and contains several provisions designed to preserve, restore, consolidate, and expand the land base of tribes, as appropriate to further the IRA's overriding goals of tribal self-government and economic development. 25 U.S.C. 462, 463(a), 464, 465. Other provisions of the IRA likewise reflect Congress's policy of promoting the economic development and self-governance of Indian tribes. 25 U.S.C. 469, 470, 471, 472, 476, 477.

The Secretary's authority under Section 5 to acquire land in trust for Indian tribes and the protection of that property against taxation is intended to further the larger statutory purposes, for example, by ensuring that tribal lands are not lost by condemnation, alienation, encroachment, or tax defaults. See generally *City of Sherrill*, 544 U.S. at 220-221 (recognizing that Section 5 serves as Congress's "mechanism for the acquisition of lands for tribal communities that takes account of the

interests of others with stakes in the area's governance and well-being" and "provides the proper avenue for * * * reestablish[ing] sovereign authority over territory" formerly held by an Indian tribe).

Moreover, as the court of appeals correctly observed, the IRA's legislative history "underscores its purpose of addressing economic and social challenges facing American Indians by promoting economic development." Pet. App. 17 (citing H.R. Rep. No. 1804, *supra*, at 6); S. Rep. No. 1080, 73d Cong., 2d Sess. 1-2 (1934); cf. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152-154 (quoting same House Report); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 335 n.17 (same).

The purposes of the IRA as reflected in its text, structure, context, and history provide the intelligible principles that guide the Secretary in the exercise of his authority under Section 5. The Secretary may acquire land "for the purpose of providing land for Indians," within the intent of Section 5, when the acquisition would advance tribal economic development, assist tribal self-governance, and restore the ancestral tribal land base. Indeed, this Court has often identified those policies as the congressional purposes that guide the Secretary's application of the IRA. See *Mancari*, 417 U.S. at 542 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 152; see also *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 168 (1980) (Brennan, J., concurring in part and dissenting in part) (noting that the IRA reflects both the "policy of encouraging tribal self-government" and the

"complementary interest in stimulating Indian economic and commercial development").

2. Petitioner's belated effort to raise the question pending before this Court in *Carcieri* should be rejected. Petitioner waived that claim. It did not raise that claim at any point in the administrative proceedings or before the district court (see Pet. 29), and petitioner did not attempt to raise it in the court of appeals until months after the completion of briefing and oral argument. The court of appeals plainly did not abuse its discretion in denying petitioner's motion to add that issue on appeal (see page 4, *supra*), and the court of appeals' ruling on that procedural issue does not warrant review by this Court. Indeed, petitioner does not contend otherwise. Moreover, this Court generally does not itself consider an issue that was neither timely raised nor passed on by the lower courts. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument because it "was inadequately preserved in the prior proceedings"); see also *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 280-281 (1993). There is no reason to depart from that rule here.[5]

Nor is there any reason to hold the petition pending this Court's decision in *Carcieri*. The *Carcieri* petitioners contend that, when tribal membership is the basis for status as an "Indian" under the IRA, the Secretary can take land into trust only for members of tribes that "were federally recognized and under federal jurisdiction in 1934." See, *e.g.*, Pet. Carcieri Br. at 13-14, *Carcieri*, *supra* (No. 07-526). Even assuming that that is

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[5] Contrary to petitioner's contention (Pet. 29-33), there is no basis to excuse its failure to properly preserve the claim. By the time petitioner filed its complaint in this suit in 2005, the petitioners in *Carcieri* had been litigating their claim for almost five years.

the sole basis on which the Band could be covered by the IRA, the record here (which is not developed on this waived claim) suggests that the Band had a government-to-government relationship with the United States well before 1934, as evidenced by a number of treaties that the Band had entered into with the United States. 62 Fed. Reg. 38,113 (1997). And, as of 1934, the Bureau of Indian Affairs apparently continued to monitor and provide some services to members of the Band. See C.A. App. 1786, 1844-1845. Moreover, the Secretary has acknowledged the Band's status through the federal acknowledgment process, which noted the Band's existence as a "continuous community since the latest date of unambiguous previous Federal acknowledgment, 1870." 63 Fed. Reg. at 56,936; see 62 Fed. Reg. at 38,113.[6]

At a minimum, it is not the case that allowing petitioner to belatedly raise the *Carcieri* issue "will cause no inefficiency or delay." Pet. 34. If this Court were to set aside the Secretary's action in *Carcieri*, any remand in this case in light of the Court's disposition of *Carcieri* would in turn require a remand to the Department of the Interior to reopen the record to develop petitioner's belated claim on the merits. The Department would need to explore the law and facts about federal recognition of

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[6] Contrary to petitioner's suggestion (Pet. 7), the Secretary did not determine that the Band's federal recognition ceased in 1870. As stated in the Assistant Secretary's final determination of acknowledgment, 1870 was the date of the Band's final annuity payment under the 1855 Treaty of Detroit, 63 Fed. Reg. at 56,936, and that date was used solely to allow the Band to proceed under 25 C.F.R. 83.8 as it modifies the criteria of 25 C.F.R. 83.7(a)-(g). But the Assistant Secretary made no finding that federal recognition ceased in 1870. See 63 Fed. Reg. at 56,936; 62 Fed. Reg. at 38,113.

and jurisdiction over the Band, including *inter alia*, any treaties, statutes, administrative activities, or the like that involved federal oversight of the Band or its property in 1934.

In any event, as noted above, the court of appeals already has twice rejected petitioner's attempt to belatedly raise the question presented in *Carcieri*, first by refusing to allow petitioner to supplement the issues on appeal after oral argument, see 07-5092 Order (D.C. Cir. Mar. 19, 2008), and then by calling for a response to petitioner's en banc petition solely on the nondelegation claim and not on the claim raised in *Carcieri*, see 07-5092 Order (D.C. Cir. May 20, 2008). There is no reason to believe that the court of appeals would reconsider that finding of waiver if the case were remanded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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In The
Supreme Court of the United States

MICHIGAN GAMBLING OPPOSITION ("MICHGO"),

Petitioner,

v.

DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of the Interior, *et al.*,

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REPLY BRIEF FOR PETITIONERS

The United States does not deny the importance of the constitutional question this case presents, nor could it. That is because the future allocation of jurisdiction between states and tribes over a potentially unlimited amount of state lands hangs in the balance, with the outcome turning on the continued viability of the nondelegation doctrine. "The importance of [whether Section 5 violates the nondelegation doctrine] is beyond cavil." Petition for Writ of Certiorari, *United States v. Roberts*, No. 99-991174, at 28 (Jan. 12, 2000).

In *Whitman v. American Trucking Associates, Inc.*, 531 U.S. 457 (2001), this Court instructed that where Congress confers a power that has broad scope – such as the power to take state land and give it to a co-sovereign – the statute must provide "substantial guidance" to the agency. As the Eighth and Eleventh Circuits have held and as Judge Brown reiterated below, Section 5 of the IRA provides absolutely no guidance. Yet this Court's directive in *Whitman* has been ignored by the D.C. Circuit majority and the other Circuits that have upheld Section 5 over nondelegation challenges. Indeed, the one thing the government does not say in its opposition brief is that there is ample guidance in Section 5's text, such that a court reviewing a land-in-trust decision can say whether that decision is in accord with Congressional will. The time is ripe for this Court to address the important issue of Section 5's constitutionality, as no less than 24 states have requested.

Neither the United States nor the Tribe disputes the importance of the *Carcieri* question, either.

Instead, the government simply questions the date when the Tribe's federal recognition ceased. At a minimum, then, this Court should hold the petition until the Court issues its decision in *Carcieri*, and, if *Carcieri* is reversed, GVR the present case for further consideration in light of *Carcieri*. Alternatively, because the administrative record and statutory language are clear, the Court should enter judgment in MichGO's favor.

I. This Court should grant the petition to decide an important constitutional issue of immense significance to state sovereignty, separation of power principles, and the delicate balance between state and Indian jurisdiction.

The United States attempts to identify reasons why this case does not merit review. That exercise is unavailing.

a. The government points to this Court's denial of certiorari in other cases raising the question of Section 5's constitutionality, including *Carcieri v. Kempthorne*, No. 07-526. Opp. at 5. But the comments of several Justices at the *Carcieri* oral argument demonstrate the important issues of state sovereignty and unlimited executive discretion that permeate the constitutional question presented and require this Court's intervention. *See, e.g.*, 11/3/08 Tr. at 36 ("[W]e are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State

law . . . ") (Roberts, C.J.); *id.* at 38 ("[Is there not] some principle of Federalism which makes us be very cautious before we take land out of the jurisdiction of the State[?]") (Kennedy, J.); *id.* at 29 ("Very strange statute, just leaving it up to [the Secretary] to do whatever he wants.") (Scalia, J.). *But see* Tribe Opp. at 11 & n.6 (arguing that the Secretary's unbridled authority to take land from states and give it to a co-sovereign is "limited" and "pales in comparison to general appropriations"). Indeed, it is the circuit courts' persistent refusal to take a Section 5 nondelegation challenge seriously that warrants this Court's immediate intervention.

b. The government does not dispute that the Eighth Circuit's decision in *South Dakota v. United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995) ("*South Dakota I*"), is directly at odds with the decision below. Opp. at 6. Instead, the government simply points out – as the petition made clear – that this Court vacated that decision. *See* 519 U.S. 919 (1996). But it remains true that the Eighth Circuit's reasoning in *South Dakota I* has never been contradicted;[1] is in direct conflict with the several circuits that have upheld Section 5's constitutionality; and caused Justices Scalia, Thomas, and O'Connor to dissent from the remand order and urge this Court to resolve the constitutional question. 519 U.S. at 920-23

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[1] "Even if a decision is vacated, . . . the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes." *Finburg v. Sullivan*, 658 F.2d 93, 100 n.14 (3d Cir. 1980).

(Scalia, J., dissenting). Moreover, the Eighth Circuit's view of the statute is consistent with the Eleventh Circuit's, which has similarly concluded that Section 5 "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate." *Florida Dep't of Bus. Regulation v. United States Dep't of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985). Further percolation in the lower courts will not be beneficial until this Court reaffirms the nondelegation doctrine's continuing vitality.

c. The passage of 70 years since Section 5's enactment is no reason to deny review. *Contra* Opp. at 6-7. The Quiet Title Act, 28 U.S.C. § 2409a, likely bars litigants from challenging land-in-trust decisions that have already become final. And the possibility that the government is unconstitutionally taking land from states and giving it to co-sovereigns is the very reason review is warranted now. *Carcieri v. Kempthorne*, No. 07-526, 11/3/08 Tr. at 36 ("[W]e are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State law . . . ") (Roberts, C.J.).

d. In their attempt to divine an intelligible principle from Section 5, the government points to everything but the text of the statute (including court decisions that discuss the supposed purposes of IRA without reference to the text). For example, it is not helpful for the government to point to the Secretary's own regulations as providing the necessary limit on his unbridled discretion under Section 5. Opp. at 8 n.4.

This Court has already held that an agency cannot cure a standardless delegation of power by promulgating limiting regulations. *Whitman*, 531 U.S. at 473. Indeed, the government's reliance on regulations as the limit that renders Section 5 constitutional is strong evidence that the statutory text has no such limit.

e. Likewise, purported limiting principles in Section 5's purpose and factual background are of no relevance in the absence of some limiting principle in the statutory text. App. 31a (Brown, J., dissenting) (discussing this Court's decisions in the *Intermountain Rate Cases* [*United States v. Atchison, Topeka, & Santa Fe Ry.*], 234 U.S. 476, 486-88 (1914), and *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)); *Whitman*, 531 U.S. at 472 (Congress must articulate an intelligible principle "by legislative *act*"); *contra* Opp. at 9. Equally important, the government's conjecture as to the statutory purpose – "to promote Indian self-government and economic self-sufficiency," Opp. at 9-11, is not at all apparent from these vague sources, as was made clear at the *Carcieri* oral argument, in Judge Brown's dissent below, and in the Eighth Circuit's decision in *South Dakota I*. *See* 11/3/08 Tr. at 39 (Roberts, C.J.) (suggesting that Section 5 is a "backward-looking" statute intended to compensate Tribes unintentionally harmed by the government's allotment policy); *accord* App. 28a (Brown, J., dissenting) (suggesting that Section 5's purpose may have been, among other things, to consolidate checkerboarded reservations); *South*

Dakota I, 69 F.3d at 883 (suggesting that Section 5's purpose was to provide homestead or agrarian land for landless Indians).[2]

f. Most important, then, is what the government does *not* say – namely, that there is ample guidance in Section 5's text, such that a court reviewing a land-in-trust decision can say whether that decision is in accord with Congressional will. Quite the opposite, Section 5 expressly vests the Secretary with unbridled "discretion" to take lands, limited only by the identity of the recipient: "for Indians." The government's submission does not so much identify guidance for the exercise of discretion as stand for the proposition that the nondelegation doctrine is no impediment to the exercise of such unbridled discretion. It is that conclusion – rejected by the Eighth Circuit in *South Dakota I*, Judge Brown in her

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[2] In claiming to fall within the scope of the tribes Congress sought to benefit when enacting Section 5, the Tribe disparages its own letter to DOI, a letter assuring the government that the Tribe was seeking federal acknowledgment provided that "there would never be casinos in our Tribe." *See* Tribe Opp. at 4 n.2. That letter was wholly consistent with the Tribe's constitution, also submitted to DOI, which stated that the Tribe is "the only Indian Tribe in the State of Michigan which has decided not to sacrifice the future of its membership to gaming interests and the changes to traditions in the community that gaming could bring." D.C. Cir. J.A. at 1863. That the Tribe could make such statements during the federal acknowledgment process, then immediately succeed in procuring the Secretary's approval to take land in trust for a casino, only serves to highlight the lack of principles limiting the Secretary's exercise of his discretion under Section 5.

dissent below, and at least 24 states – that this Court should review.

II. At a minimum, this Court should hold the petition until the Court issues its opinion in *Carcieri* and, if *Carcieri* is reversed, GVR the present case for further consideration in light of *Carcieri*.

Respondents also make several arguments to avoid the application of this Court's anticipated ruling in *Carcieri v. Kempthorne*, No. 07-526, and any change in the law resulting from that decision. Those arguments are equally unavailing.

a. The Tribe – but not the government – argues in a footnote that MichGO lacks standing to raise the *Carcieri* issue because MichGO's members are not within the "zone of interests" the IRA protects. Tribe Opp. at 13 n.8. But the prudential standing test is not demanding; it requires plaintiffs to demonstrate only that their interests are "arguably within the zone of interests" protected by the statute forming the basis of their claims. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). To satisfy prudential standing, the plaintiff need not show that, "in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff." *Nat'l Credit Union*, 522 U.S. at 492. "The essential inquiry is whether Congress 'intended

for a particular class of plaintiffs to be relied upon to *challenge* agency disregard of the law.'" *Clarke*, 479 U.S. at 399 (citation omitted, emphasis added).

MichGO easily satisfies prudential standing. MichGO's members are the individuals and businesses that will be most affected by the casino's impacts. D.C. Cir. J.A. at 21, 465, 1202, 1207-08. Thus, MichGO's members represent the very class of plaintiffs that Congress would have intended and expected to challenge the Secretary's "disregard of the law." *Clarke*, 479 U.S. at 399. Indeed, IRA regulations *require* the Secretary to consider the impact that a land-in-trust action will have on the surrounding community and to provide an opportunity for community members to communicate their concerns to the Secretary. 25 C.F.R. §§ 151.10-12. MichGO's members will be uniquely impacted by the government's erroneous land-in-trust decision (which is why the Tribe does not contest MichGO's constitutional standing) and are within IRA's zone of interests.

b. Anticipating that this Court may reverse the First Circuit's decision in *Carcieri*, the Tribe also argues that it was federally recognized and under federal jurisdiction in 1934. Tribe Opp. at 15. Earlier in the litigation, however, the Tribe acknowledged that it *lost* its federal recognition long before IRA's enactment. *See* Pet. 7, citing D.C. Cir. J.A. at 1772; *see also* Appeal Br. of Def.-Appellee Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians at 42 (the Tribe

"was not federally recognized and had no reservation when IGRA was enacted [in 1988]").

The Tribe's admissions in the lower courts are consistent with the administrative record. BIA determined that the Tribe's federal acknowledgement ceased in 1870 when the Tribe decided to discontinue its compliance with the Treaty of 1855.[3] 62 Fed. Reg. 38,113 (1997) (1870 "has been used as the date of the latest Federal acknowledgement for purposes of this finding to enable the petitioner to proceed under the provisions of section 83.8."). While BIA made this finding under the regulations governing federal acknowledgement, Tribe Opp. at 16, there is no basis for suggesting that BIA's determination was incorrect or even controversial. The Tribe never questioned this conclusion, nor would it: the federal government's finding was legally required for the Tribe to obtain federal acknowledgement in 1999, which in turn was a necessary prerequisite for having land taken in trust under IRA.

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[3] The National Congress of American Indians, which represents the Gun Lake Band, stated in an *amicus* brief submitted to the First Circuit *en banc* in *Carcieri*, that it is "false" to assume that a treaty between a tribe and the United States in the 1800s, such as the 1855 Treaty of Detroit, demonstrates that a tribe was recognized in 1934. Supp. *En Banc* Br. for *Amici Curiae* Nat'l Congress of Am. Indians, at 13 n.6 (Dec. 26, 2006).

Despite all this, the Tribe now seeks to disavow BIA's finding – and the Tribe's previous endorsement of it – arguing that according to BIA, the Tribe's federally recognized status has never been "lawfully terminated." Tribe Opp. at 4, 15, citing 62 Fed. Reg. 38,113-38,114. But all BIA stated was that it found no evidence that the Tribe was ever terminated by *legislation*, 62 Fed. Reg. 38,114, a determination necessary for BIA to federally acknowledge the Tribe under 25 C.F.R. § 83.3(e). The proper question is whether there was an effective termination by any other means, including administrative action. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 968 (6th Cir. 2004) (asking whether "the executive branch of the government illegally acted as if the [tribe's] recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years").

Here, both Respondents have admitted that the Tribe's federal recognition was terminated no later than 1870. In fact, the Tribe has stated that it sought recognition in 1934 in response to IRA's enactment, but that "before the Tribe could take firm action the [BIA] . . . decided to *withhold recognition* for lower peninsula of Michigan Indian Tribes in the IRA process." D.C. Cir. J.A. at 1844. Accordingly, if this Court holds in *Carcieri* that the acquisition statute requires that a tribe be under federal jurisdiction and

federally recognized in 1934, the Tribe is ineligible for a land-in-trust acquisition.[4]

c. Finally, both Respondents argue that MichGO waived the *Carcieri* issue by failing to raise it until after this Court granted certiorari in *Carcieri*. Opp. at 12; Tribe Opp. at 14-15. Respondents say that MichGO should have been aware of the potential claim because *Carcieri* had been in litigation for five years when MichGO filed its Complaint. But as Respondents themselves note, *see* Opp. at 12; Tribe Opp. at 15, both the district court and the First Circuit in the *Carcieri* litigation *rejected* the statutory argument, consistent with the other Circuits that had addressed the question. *Carcieri v. Kempthorne*, No. 07-526, United States Opp. at 5 (Nov. 21, 2007) ("The court of appeals' decision is consistent with this Court's precedents and does not conflict with the decisions of any other circuit."). Because MichGO had no reason to anticipate a change in the established law, it should be allowed to raise the issue of the Tribe's ineligibility for a land-in-trust acquisition if this Court reverses in *Carcieri*.[5]

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[4] Significantly, the government in its opposition brief never endorses the Tribe's position. The government suggests that, if this Court reverses *Carcieri*, a remand would be necessary. Opp. at 13-14.

[5] The Tribe contends that the legal precedent permitting appellate consideration of arguments following an intervening change of law applies only to constitutional claims, Tribe Opp. at 15, but that is incorrect. In *Hormel v. Helvering*, 312 U.S. 552 (1941), for example, this Court permitted appellate

(Continued on following page)

Indeed, failing to apply *Carcieri* here would defeat the ends of justice, as it would result in the government taking land in trust for a tribe that was not recognized or under federal jurisdiction in 1934. Even if the government is correct that a remand is necessary to determine the Tribe's status as of 1934 (which MichGO disputes), there is no legal basis for refusing to apply the new rule simply because it would require a remand. It would be incongruous and contrary to the public interest to apply *Carcieri*, as the Tribe proposes, to all pending land-in-trust decisions *except* this one. *See Standard Indus., Inc.*, 397 U.S. at 587-88 (setting forth three-part test for considering new arguments on appeal, including whether an important public interest is served); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (change in law applies to all cases still open on direct review). It would therefore be wholly appropriate for this Court to hold MichGO's petition pending a decision in *Carcieri*, and, if *Carcieri* is reversed, GVR the

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consideration of a purely statutory argument raised for the first time on appeal, following an intervening decision of this Court that changed the statute's interpretation. The Court held that any other decision "would defeat rather than promote the ends of justice." *Id.* at 560 (remanding for consideration of additional evidence); *see also Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587 (1970) (Black, J., dissenting) ("the Court has permitted consideration on appeal of statutory arguments not presented below").

present case for further consideration in light of *Carcieri*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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